

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEWEL J. TURNER,

Plaintiff,

v.

ATLANTIS PLASTICS, INC.,

Defendant.

Case No. 98CV0674K (E)

ENTERED ON DOCKET

DATE JUN 10 1999

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto,
by their respective counsel, that the above-captioned action be dismissed with prejudice,
without costs or attorney's fees to any party.


JEWEL J. TURNER

ATLANTIS PLASTICS, INC.

By


Joe L. White

By

 6/3/99
Frank A. Gumina

1718 West Broadway
Collinsville, OK 74021
(918) 371-2531

ATTORNEY FOR PLAINTIFF

WESSELS & PAUTSCH, P.C.
330 East Kilbourn Avenue
Suite 1475
Milwaukee, WI 53202
(414) 291-0600

ATTORNEYS FOR DEFENDANT

mailed 6/15/99

112

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNA LOWE,

Plaintiff,

v.

TOWN OF FAIRLAND, Oklahoma,
a Municipal Corporation,
BEVERLY HILL, DON JONES,
SHIRLEY MANGOLD, LORETTA
VINYARD, BILL PINION, RICHARD
JAMES, and WALLACE, OWENS,
LANDERS, GEE, MORROW, WILSON,
WATSON & JAMES, A Professional
Corporation,

Defendants.

FILED

JUN 10 1999


Phil Lombardi, Clerk
U.S. DISTRICT COURT


No. 96-C-0066 K


ENTERED ON DOCKET
DATE JUN 10 1999

STIPULATION FOR ORDER OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Donna Lowe, her attorney of record, and Defendants' counsel, and would show the Court that this matter has been compromised and settled and, therefore, moves the Court for an Order Of Dismissal With Prejudice.


Donna Lowe


D. Gregory Bledsoe, OBA #0874
Attorney for Plaintiff


Gregory D. Nellis
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN LITTERELL,
Plaintiff,

vs.

FARMERS INSURANCE CO. INC.,
Defendants.

ENTERED ON DOCKET
DATE **JUN 10 1999**

No. 98-CV-611-K ✓

FILED

JUN 09 1999

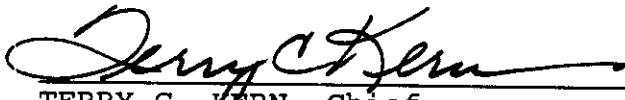
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 8 day of June, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

JAMES C. LUMAN,)

Defendant.)

Case No. 74-CR-138-E
(99-C-301-E)

ENTERED ON DOCKET

DATE JUN 09 1999

ORDER


Now before the Court is the Defendant James C. Luman's Motion to Vacate/Nullify Judgment and Commitment.

Luman seeks to have this Court vacate a Judgment and Commitment dated February 19, 1975 by which he was sentenced to the maximum term of 5 years' imprisonment pursuant to the provisions of 18 U.S.C. §4208(c). Luman seeks this remedy because that sentence was used to enhance a later sentence which he is currently serving. He argues that the February 19, 1975 Judgment should be vacated because, although a definitive sentence of 5 years imprisonment was pronounced on July 8, 1975, the Court modified the sentence to a term of 3 years probation on November 4, 1975. Notably, Luman does not have any authority for his proposition that the effect of modification is to vacate the original sentence. Moreover, the government argues that the judgments speak for themselves, and that there is no need for nullification.

In response to a similar request by Luman, that the Court nullify its July 8, 1975 order, the Court denied Luman's motion, holding that the second order of November 4, 1975 supersedes the July 8, 1975 order, "thereby satisfying defendants motion to have this Court enter an order nullifying the July 8, 1975 order." With respect to this motion, the Court must reach the same conclusion.

The November 4, 1975 order supersedes the February 19, 1975 Judgment, and therefore, Luman's Motion to Vacate/Nullify Judgment and Commitment is unnecessary and must be **Denied**.

IT IS SO ORDERED THIS 7TH DAY OF JUNE, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REX CURTIS, for
MINI-MEX CHICKEN KING CORP.,

Plaintiff,

vs.

DEAN AND CAROLYN MEADE,

Defendants.

ENTERED ON DOCKET

DATE JUN - 9 1999

No. 98-CV-842-K

FILED

JUN 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This action was filed by the Plaintiff on November 2, 1998. The Defendants, Dean and Carolyn Meade, filed a Motion to Dismiss the Complaint (#4) on December 4, 1998, arguing that the Plaintiff's case must be dismissed as to all sixteen counts alleged in the Complaint. Now, six (6) months since the filing of Defendants' motion, the Court finds that the Plaintiff has altogether failed to respond. The Plaintiff has not requested leave of this Court for a continuance, or offered good cause for its failure to respond to the motion to dismiss. Pursuant to *Local Rule 7.1.c.*, upon failure to respond to a dispositive motion the Court may enter the requested relief and deem the matter admitted. Notwithstanding the local rule, the Court has conducted an independent inquiry and finds that the Plaintiff's claim must be dismissed in its entirety.

Because the Plaintiff has not shown good cause for failure to respond, the Court finds that the above styled case must be dismissed WITHOUT PREJUDICE. The Defendants' Motion to Dismiss (#4) is hereby GRANTED.

ORDERED THIS 7 DAY OF JUNE, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARDNER DENVER, INC.,
a Delaware corporation,

Plaintiff,

vs.

INTERFAB, LTD., and Oklahoma
corporation, WILLIAM B.
SCHLUNEGER, DIRECTOR JOHN
DOE 1, DIRECTOR JOHN DOE 2,
DIRECTOR JOHN DOE 3,
DIRECTOR JOHN DOE 4,
DIRECTOR JOHN DOE 5,
Individuals,

Defendants.

ENTERED ON DOCKET

DATE JUN - 9 1999

No. 98-CV-628-K

FILED

JUN 08 1999 *FL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT
ORDER

This matter came before the Court for consideration of the Motion by Plaintiff Denver Gardner, for Summary Judgment against Defendants InterFab, Ltd. and William B. Schluneger, individually.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants in the amount of \$400,000, plus interest thereon.

ORDERED this 8 day of June, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

GARDNER DENVER, INC.,
a Delaware corporation,

Plaintiff,

vs.

**INTERFAB, LTD., and Oklahoma
corporation, WILLIAM B.
SCHLUNEGER, DIRECTOR JOHN
DOE 1, DIRECTOR JOHN DOE 2,
DIRECTOR JOHN DOE 3,
DIRECTOR JOHN DOE 4,
DIRECTOR JOHN DOE 5,
Individuals,**

Defendants.

ENTERED ON DOCKET

DATE JUN - 9 1999

No. 98-CV-628-K ✓

F I L E D

JUN 08 1999 *SA*

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

ORDER

Before the Court is the Plaintiff's Motion for Summary Judgment and Brief in Support (#20). This is a debt collection action brought against InterFab, Ltd. by Gardner Denver. In February, 1997, InterFab, Ltd. ordered two PZ-11 Triplex Mud Pumps from Gardner Denver, the manufacturer of these pumps. At InterFab's requests, Gardner Denver shipped the pumps to the end user, Patterson Drilling. Gardner Denver also invoiced InterFab for \$440,000.00, the price at which InterFab had ordered the two pumps. InterFab never paid for these two pumps. The pumps themselves were in good working order, and InterFab never received any complaints about the pumps from Patterson Drilling. InterFab's only stated reason for the non-payment is a business dispute over whether Gardner Denver sold directly to other InterFab customers.

Additionally, at the time it ordered these pumps and then failed to pay for them, InterFab was suspended from doing business in Oklahoma, due to non-payment of its franchise taxes. Oklahoma law provides that corporate officers and directors are personally liable for corporate debt incurred during a suspension. Consequently, Gardner contends that William B. Schluneger, InterFab's only officer or director, is personally liable for the InterFab debt to Gardner Denver pursuant to Okla. Stat. tit. 68, § 1212(b).

InterFab has asserted a counterclaim for breach of contract against Gardner Denver, asserting that


Gardner Denver agreed not to advertise and sell directly to InterFab's customers.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).

The Plaintiff's Motion for Summary Judgment was filed on May 7, 1999. The Defendants failed to respond by the May 25 deadline, and that response is now more than a week overdue. In addition, the parties' pre-trial date, set for July 12, 1999, is impending. The Defendants have not presented to this Court any request for a continuance in which to file their response, nor have they offered good cause for the delay. According to *Local Rule 7.1.C*, the Court has the discretion to deem the matter confessed and enter the relief requested. The Court has nevertheless conducted an independent inquiry, and finds that the Plaintiff's Motion for Summary Judgment must be granted.

It is hereby ORDERED, the Plaintiff's Motion for Summary Judgment (#20) is GRANTED against Defendant InterFab, Ltd. and Defendant Schluneger individually. The Defendants' counterclaim is dismissed. The parties may file motions for attorney's fees pursuant to *Local Rule 54.2*.

ORDERED this 8 day of June, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM HENRY JOHNSON, JR.,

Petitioner,

vs.

L. L. YOUNG, Warden,

Respondent.

ENTERED ON DOCKET
DATE JUN - 9 1999

Case No. 99-CV-0042-K (E) ✓

FILED

JUN - 8 1999 *SA*


JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 7 day of June, 1999.


TERRY C. KEEN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM HENRY JOHNSON, JR.,)

Petitioner,)

vs.)

L. L. YOUNG, Warden,)

Respondent.)

ENTERED ON DOCKET

DATE **JUN - 9 1999**

Case No. 99-CV-0042-K (E) ✓

F I L E D

JUN 08 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #19) entered on April 12, 1999, in this 28 U.S.C. § 2254 habeas corpus action. The Magistrate Judge recommends that Respondent's motion to dismiss (#7) be granted, the petition for writ of habeas corpus (#1) be dismissed as barred by the § 2244(d) statute of limitations and Petitioner's motions for additional transcripts (#9), for appointment of counsel (#16), for expansion of the record (#17), and for production of documents (#18) be denied as moot. On April 23, 1999, Petitioner filed his objection to the Report (#21).

In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and concludes that, for the reasons discussed below, the Report should be adopted and affirmed.

BACKGROUND

On May 7, 1996, Petitioner was convicted after pleading guilty to Rape, Rape by Instrumentation, Robbery by Force, Kidnaping, Possession of a Stolen Vehicle, Assault and Battery, Attempting to Elude A Police Officer, and Defective Vehicle, in Tulsa County District Court, Case No. CF-95-5796. Petitioner did not file a direct appeal. On April 30, 1997, Petitioner sought post-conviction relief in the trial court, requesting to withdraw his guilty plea (#8, Ex. B) and leave to appeal out of time (#21, Ex. A). The state district court's order denying relief¹ was signed October 6, 1997² (#8, Ex. A). Petitioner attempted to appeal the trial court's denial of post-conviction relief. However, on January 16, 1998, the Oklahoma Court of Criminal Appeals found that Petitioner had failed to file his appeal papers within thirty (30) days of the October 13, 1997 entry of the order denying post-conviction relief and dismissed the appeal as untimely (#8, Ex. C). This Court received the instant habeas corpus petition on January 14, 1999 (#1).

In her Report, the Magistrate Judge finds that the petition was not filed within the one-year limitations period imposed by 28 U.S.C. § 2244(d). As a result, the Magistrate Judge recommends that Respondent's motion to dismiss be granted and that the petition be dismissed as barred by the statute of limitations

Petitioner objects to the Magistrate Judge's conclusions, alleging that the instant petition was in fact timely filed. Petitioner asserts that the trial court issued its decision denying Petitioner's application for post-conviction relief on October 13, 1997, but the order was not file-stamped until

¹The trial court's order denying post-conviction relief effectively denied both Petitioner's motion to withdraw guilty plea and his motion for leave to appeal out of time.

²The filed-stamp date on the order is March 24, 1998 (see #8, Ex. A).

March 24, 1998 and Petitioner did not receive a copy of the order until March 28, 1998. Petitioner further maintains that the one-year limitations period began to run on March 27, 1998 making his federal habeas corpus deadline March 27, 1999. Therefore, according to Petitioner, the instant petition, filed January 14, 1999, well before the alleged March 27, 1999 deadline, was timely. Citing Murray v. Carrier, 477 U.S. 478, 480 (1986) and Schlup v. Delo, 513 U.S. 298 (1995), Petitioner also argues that because he claims to be “actually innocent” of the crimes for which he was convicted, this Court must consider his claims.

DISCUSSION

After reviewing the record, the Report, and Petitioner's objections to the Report, the Court finds that the instant petition was not timely filed. As indicated in the Report, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) amended the habeas corpus statutes to provide for the first time a one-year statute of limitations. See 28 U.S.C. § 2244(d). The Magistrate Judge correctly applied the statute to find that in the instant case, the one-year period began to run on May 17, 1996, or ten days after Petitioner entered a guilty plea and then failed to file a motion to withdraw his guilty plea. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgement and Sentence in order to commence an appeal from any conviction of a plea of guilty). Absent a tolling event, Petitioner then had one year, or until May 17, 1997, to commence a federal habeas corpus action.

However, pursuant to § 2244(d)(2), the running of the limitations period will be tolled or suspended during the pendency of any state post-conviction proceedings properly filed during the

one year period. Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir. 1998). Petitioner did seek post-conviction relief, filing his application April 30, 1997, or seventeen (17) days before the May 17, 1997 deadline. Therefore, Petitioner had to file his federal habeas corpus application within seventeen (17) days of the conclusion of state post-conviction review. Petitioner failed to meet that deadline.

Petitioner's objections to the Report do not convince the Court that the petition was timely filed. His contention that the conclusion of post-conviction proceedings in state court triggers the commencement of the limitations period is not supported by the statute. Pursuant to § 2244(d)(2), the limitations period is only tolled or suspended during the pendency of post-conviction proceedings. Events that trigger the commencement of the period are defined in § 2244(d)(1). Conclusion of state post-conviction proceedings is not identified as a triggering event. See § 2244(d)(1).³ Furthermore, neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to *pro se* prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner).

In addition, although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998), the Court is not persuaded by Petitioner's attempt to justify his late filing. Petitioner does assert a claim of "actual innocence."⁴ However, even if Petitioner were to make a colorable showing of actual innocence, he must also

³Even if the Court were to find that state post-conviction proceedings did not conclude until March 28, 1998, the date of the district court's "filed" stamp, Petitioner's federal petition, filed January 14, 1999 would be untimely.

⁴As noted in the Report, Petitioner's claim is one of "legal innocence" rather than "actual innocence."

demonstrate that he has diligently pursued his habeas corpus claims before the Court can equitably toll the limitations period. See id., (stating that inmates are required to pursue their claims diligently in order to avail themselves of equitable tolling); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). Petitioner in this case offers no reason for his delay in seeking post-conviction relief until only seventeen (17) days remained in his one year limitations period. Therefore, the Court agrees with the Magistrate Judge's conclusion that due to his lack of diligence, Petitioner is not entitled to equitable tolling in this case. The petition for writ of habeas corpus should be dismissed with prejudice as untimely.

CONCLUSION

The Court has reviewed de novo those portions of the Report to which the Petitioner has objected, see Rule 8(b), Rules Governing Section 2254 Cases, and 28 U.S.C. § 636(b)(1)(C), and concludes that the Report and Recommendation of the United States Magistrate Judge should be adopted and affirmed. Respondent's motion to dismiss should be granted and Petitioner's petition for writ of habeas corpus should be dismissed with prejudice. Petitioner's motions for additional transcripts, for appointment of counsel, for expansion of the record, and for production of documents should be denied as moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the United States Magistrate Judge (#19) is **adopted and affirmed.**
2. Respondent's motion to dismiss for failure to meet the limitations period (#7) is **granted.**
3. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1) is **dismissed with prejudice.**
4. Petitioner's motions for additional transcripts (#9), for appointment of counsel (#16), for expansion of the record (#17), and for production of documents (#18) are **denied as moot.**

SO ORDERED THIS 7 day of June, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATIONAL OILWELL, L.P.,

Plaintiff,

vs.

INTERFAB, INC.,

Defendant.

ENTERED ON DOCKET

DATE JUN - 9 1999

No. 98-CV-425-K

FILED

JUN 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the plaintiff for partial summary judgment. Plaintiff brought this action for breach of contract and fraud. In June, 1997, plaintiff and defendant entered into a purchase agreement for the sale of oil rig drilling components. Defendant was to sell these components and deliver them in separate installments.

Plaintiff alleges that the first three deliveries failed to contain the components requested or were substandard and did not meet defendant's representations of quality. Plaintiff alleges that defendant failed to deliver the fourth installment, even though plaintiff had already paid for the components. Plaintiff asserts that defendant breached the contract by delivering substandard component parts and by failing to deliver parts for which payment had already been made. Plaintiff also asserts that defendant's conduct was fraudulent.

Defendant has filed a counterclaim asserting that plaintiff induced it to enter into the contract by falsely claiming that it

would make defendant a licensed representative for plaintiff in the Tulsa area. Defendant alleges it sold the component parts to plaintiff at a reduced price, based upon that fraudulent representation.

Plaintiff now moves for summary judgment as to (1) its claim regarding the fourth shipment of component parts (i.e., plaintiff's second cause of action) and (2) defendant's counterclaim. The appropriate standard for summary judgment is set forth in Rule 56(c) F.R.Cv.P. The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment. Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir.1998).

Turning to the counterclaim, plaintiff simply asserts that (1) there is no evidence that there was ever an agreement to make defendant a licensee, and (2) there is nothing in the Purchase Agreement or any other agreement that provides that the prices quoted (and billed) would be increased in the event defendant did not become a licensee.

Defendant's president acknowledged in his deposition that the written contract reflected the complete understanding between the parties with regard to the purchase of equipment. (Schluneger Depo. at 92). Defendant, in arguing that this remains a genuine issue of material fact, points to a letter from defendant's president to plaintiff which states in part "am looking forward to working close with National as a License [sic]." First, the letter predates the executed contract and is therefore barred by the parol

evidence rule. See 12A O.S. §2-202. Second, at most the letter reflects belief on defendant's part.

In the same vein, defendant cites deposition testimony of its president as to how important becoming one of plaintiff's licensees was to him. Defendant states that the testimony clearly indicates that defendant's "reliance influenced (downward) its pricing of the subject equipment." As the Court reads the testimony, defendant's president nowhere states that he reduced the price in reliance upon a promise of becoming a licensee. In any event, defendant has failed to show any "meeting of the minds", either in statements by plaintiff or in the written contract, on this point. Summary judgment is appropriate.

Regarding the fourth shipment, defendant concedes that the parts were never delivered to plaintiff. However, defendant contends that plaintiff had underpaid other invoices by the sum of \$69,230.00¹. Although not completely clear, defendant appears to be raising an issue of offset, and has made no argument that underpayment of another invoice by plaintiff constitutes a defense to a defendant's failure to deliver goods. Defendant also makes a convoluted argument regarding a deposit paid by plaintiff regarding this fourth shipment. Defendant states that under the agreement "the deposit is a component of pricing", which apparently means that plaintiff was not necessarily entitled to return of the full

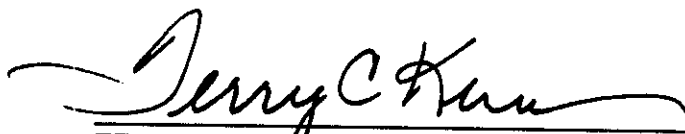
¹Plaintiff has presented deposition testimony of defendant's controller that the alleged underpayment was a negotiated item between the parties. The witness' memory of the entire transaction does not appear acute, however.

deposit. Again, defendant's argument, as the Court understands it, does not go to liability but to amount of damages.

Under the circumstances, and viewing the record in the light most favorable to defendant as nonmovant, the Court will grant summary judgment in plaintiff's favor as to liability only on its second cause of action. The amount of damages will be resolved in conjunction with the trial on the other three claims of breach of contract, when a full factual context can be established.

It is the Order of the Court that the motion of the plaintiff for partial summary judgment (#10) is hereby GRANTED. Judgment is granted in favor of plaintiff as to defendant's counterclaim. Judgment is further granted in favor of plaintiff on plaintiff's second cause of action for breach of contract as to liability only.

ORDERED this 7 day of June, 1999.

A handwritten signature in cursive script, reading "Terry C. Kern", written in dark ink. The signature is fluid and stylized, with a long horizontal flourish extending to the right.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAYMOND E. WALKER, JR.,

Plaintiff,

vs.

ADAMS AND ASSOCIATES OF NEVADA,
INC., a/k/a ADAMS AND ASSOCIATES,
INC., d/b/a TULSA JOB CORPS,

Defendant.

ENTERED ON DOCKET

DATE JUN - 9 1999

Case No. 98-CV-0677K(M) ✓

Judge Kern

F I L E D

JUN 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal with Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal with no finding of race discrimination and/or racial harassment on the part of the Adams and Associates of Nevada, Inc., a/k/a Adams and Associates, Inc., d/b/a Tulsa Job Corps. ("Adams and Associates").

IT IS THEREFORE ORDERED that this matter is dismissed with prejudice with no finding of any race discrimination and/or racial harassment on the part of Adams and Associates. Each party shall bear their own attorney fees and costs.


JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEERE CREDIT, INC.,
A Delaware Corporation,
Plaintiff,

Vs.

Case No. 98CV923 BU(M)

(1) RV'S R US, INC., an Oklahoma
Corporation,
(2) DON GASAWAY, an individual,
(3) PATTI BOGART, an individual,
(4) JACK BOGART, an individual,

Defendants.

ENTERED ON DOCKET
DATE JUN 8 1999

JOINT STIPULATION OF DISMISSAL
WITHOUT PREJUDICE

By stipulation of the parties hereto and following Rule 41(a)(1) of the Federal
Rules of Civil Procedure, the above-entitled cause is hereby Dismissed without Prejudice
to the refiling thereof.

DEERE CREDIT, INC.

By:

O. CLIFTON GOODING (OBA # 10315)

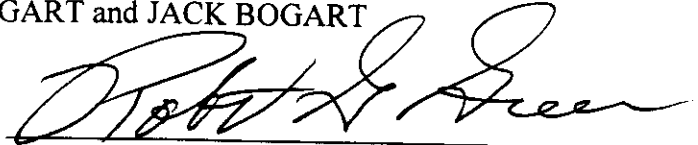
OF THE FIRM:

ADAMS & ASSOCIATES
A Professional Corporation
204 N. Robinson
Twenty Fifth Floor
Oklahoma City, OK 73102
405.232.0200 - Telephone
405.232.0211 - Telecopier

Attorney for DEERE CREDIT, INC

RV'S R US, INC., DON GASAWAY, PATTI
BOGART and JACK BOGART

By:



ROBERT G. GREEN (OBA #3573)

2420 South Owasso Place
Tulsa, Oklahoma 74114-2642
918.743.0515 – Telephone
918.743.6577 – Telecopier

Attorney for RV'S R US, INC., DON
GASAWAY, PATTI BOGART and JACK
BOGART

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLPHIN MANUFACTURING COMPANY,)
INC., an Oklahoma Corporation,)

Plaintiff,)

vs.)

No. 99-CV-194-E (EA) ✓

MOVIES & GAMES 4 SALE, L.P., a)
Texas limited partnership, and)
GAMES TRADER, INC., a Canadian)
corporation, and COMERICA)
BANK-TEXAS,)

Defendants.)

ENTERED ON DOCKET


DATE JUN 08 1999

ADMINISTRATIVE CLOSING ORDER

The Defendant, Movies and Games 4 Sale, having been the subject of an involuntary petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 4th day of June, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

38

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESSE JONES,

Defendant.

Case No. 83-CR-132-E
(97-C-121-E)

ENTERED ON DOCKET

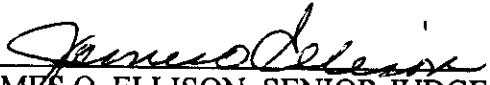
JUN 08 1999

JUDGMENT

This matter came before the Court upon the Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #287) of the Defendant, Jesse Jones and a subsequent Franks hearing on the first three issues raised. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff, United States of America, and against Defendant, Jesse Jones, on all issues.

IT IS SO ORDERED THIS 4th DAY OF JUNE, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

319/3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN - 4 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESSE JONES,

Defendant.

Case No. 83-CR-132-E
(97-C-121-E)

ENTERED ON DOCKET
DATE JUN 08 1999

ORDER

This Court has previously ruled on Defendant Jesse Jones' Motion to Vacate, Correct, or Set Aside Sentence Pursuant to 28 U.S.C. §2255 (Docket #287), denying all allegations of error except for the first three allegations related to the veracity of the affidavit underlying the search warrant. With respect to those three allegations, the Court held that a hearing was required by Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2685 (1978).

Jones alleges that the Affidavit by which the search warrant in this case was procured was either intentionally false or made with reckless disregard for the truth. He argues that his counsel should have performed an investigation that would have included an interview of the confidential informant, Roy Lee Dunn, prior to trial, that his counsel failed to charge the government with outrageous conduct, and his counsel failed to object to the government's failure to present witness Roy Lee Dunn at trial. With respect to the first allegation of error, Jones argues that the prejudice from this failure to investigate comes from the testimony of Roy Lee Dunn at an IRS hearing on February 4, 1989. At the IRS hearing, Dunn gave testimony that calls into doubt statements made in the affidavit by Special Agent Ronald Bell. Dunn testified at the IRS hearing that he knew Glenn

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Chism, a special agent for the Drug Enforcement Agency, but did not know Gerald Isaacs, a Tulsa Police Officer, or Ronald Bell, a special agent for the Federal Bureau of Investigation. Dunn testified that he did not accompany Jones to the bank for the purpose of withdrawing a large amount of cash, that he did not have any knowledge that Jones had purchased a large amount of cocaine, that he had only been in Jones residence twice, had remained in the living room, and had never seen anything of an illegal nature in the residence. Dunn also testified that he had not intentionally given any false statements to any government agent.

With respect to the requirement of a hearing on the veracity of an affidavit underlying a search warrant, the Court in Franks v. Delaware, 438 U.S. at p. 171, held:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

Based on Franks, this Court held that a hearing was necessary to determine the veracity of Bell, Chism, and Isaacs in procuring the search warrant.

Hearings were held on September 9, 1998, when Gerald Isaacs and Ronald Bell testified, on September 17, 1998, when Gerald Isaacs and Roy Lee Dunn testified, and on October 6, 1998, when Glenn Chism and Marty Weber testified. Although Roy Lee Dunn made statements that could call into question statements made in the affidavit, the Court specifically finds that Dunn, at this point is not credible. Dunn made several inconsistent statements within his testimony given on September

17, 1998, admitted to lying on more than one occasion because he "wanted to get paid," and was either confused or did not remember on several key points.

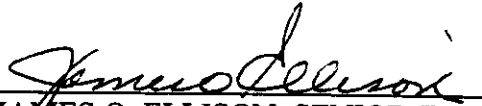
On the other hand, nothing in the testimony of the officers or agents was inconsistent with the statements in the affidavit. Ronald Bell, the agent who authored the affidavit, testified that he did not know Dunn, that he relied on Gerald Isaacs for the information in the affidavit, that he had worked with Isaacs previously and found him to be absolutely trustworthy, and that he had no reservations at all about the truthfulness of the statements in his affidavit at the time that he made it. Specifically Gerald Isaacs, who provided information from Roy Lee Dunn to Agent Bell for the affidavit, testified that he had no reason to believe that Dunn was being untruthful with him, that he had worked with Dunn previously and believed that Dunn had been truthful on the previous occasions.

On these facts, the Court must find that the standard set forth in Franks , that of reckless disregard for the truth by the affiant, simply is not met by Jones with this evidence. While Dunn certainly does not appear credible now, there is no evidence that either Officer Isaacs or Agent Bell were concerned about or should have been concerned about his credibility at the time that the affidavit was drafted. Moreover, no evidence presented at the hearings supports the allegations of error regarding the governments' alleged "outrageous conduct," or Jones' speculation of what Dunn might have said if called to testify at trial.

The remainder of Jones' Motion to Vacate, Correct, or Set Aside Sentence Pursuant to 28 U.S.C. §2255 (**Docket #287**) is **Denied**. Further, due to the decision of the Court of Appeals in United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999), Jones' Motion to Amend §2255 Petition to Include Ineffective Assistance of Counsel for Failure to File Motion to Suppress Testimony of Witnesses Obtained in Violation of Title 18 §201(c)(2) (**Docket #315**) and Jones' Motion to Add

Caselaw and Statute (**Docket # 316**) are Denied as Moot.

IT IS SO ORDERED THIS 4th DAY OF JUNE, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VERNETTA B. CARTER,
SSN: 569-84-1498

Plaintiff,

v.

Kenneth S. Apfel, Commissioner of
Social Security,

Defendant.

FILED

JUN 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-451-J ✓

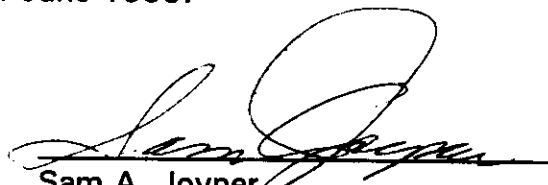
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DATE JUN 8 1999

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's decision and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 7th day of June 1999.


Sam A. Joyner
United States Magistrate Judge

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

VERNETTA B. CARTER,
SSN: 569-84-1498

Plaintiff,

v.

Kenneth S. Apfel, Commissioner of
Social Security,

Defendant.

FILED

JUN 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-451-J ✓

ENTERED ON DOCKET

DATE **JUN 8 1999**

ORDER^{1/}

Plaintiff, Vernetta B. Carter, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner.^{2/} Plaintiff asserts error because (1) the Commissioner failed to follow the law of the case, and (2) the Commissioner's decision is not supported by substantial evidence and the ALJ did not properly evaluate the opinions of Plaintiff's treating physicians. For the reasons discussed below the Court **reverses and remands** the decision of the Commissioner.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born November 21, 1948, and was 44 years old at the time of her first hearing before the ALJ. [R. at 43, 91]. Plaintiff testified that she had obtained an associate degree in secretarial administration, but that she was no longer able to

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Administrative Law Judge Stephan C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled on February 26, 1993. [R. at 25]. Plaintiff's appeal was remanded to the Commissioner at the request of the Commissioner. A second decision of the ALJ was issued on September 15, 1997. [R. at 288]. The ALJ concluded that Plaintiff was not disabled. [R. at 288].

type without typographical errors. [R. at 43]. According to Plaintiff, Dr. Copple treated her for a blood clot which she had in her leg. Plaintiff stated that she must constantly elevate her leg or it will swell. [R. at 56]. Plaintiff testified that she was unable to lift anything over five pounds. [R. at 62].

Plaintiff was admitted on July 3, 1991 for aseptic meningitis. She was discharged on July 10, 1991. [R. at 135]. An MRI was interpreted as "unremarkable." [R. at 158]. Plaintiff was again admitted on July 16, 1991, and discharged on July 22, 1991 for left deep venous thrombosis. [R. at 216]. Plaintiff complained of swelling in her legs on July 29, 1991. [R. at 165].

On February 10, 1992, Plaintiff complained of left leg pain and swelling. [R. at 166]. Dr. Dalessandro concluded that "at this time there is definite inability of this patient to use her left extremities at 100%. Since it has been over six (6) months since the episode, it is my opinion the left extremity will not improve. [R. at 169].

Plaintiff was admitted on July 27, 1992, and discharged on July 29, 1992 for chest pain and nausea. [R. at 229]. The cause of Plaintiff's chest pain was undetermined. [R. at 229].

Plaintiff's treating physician wrote, on December 16, 1992, that Plaintiff had chronic pain, swelling, and tenderness in her left lower leg. He also noted that Plaintiff had pain and cramping in her left leg with "any attempt at ambulation." [R. at 267]. He concluded that her condition would interfere with any gainful occupation "particularly that requiring any effort at being on her feet. I do feel that she can ambulate somewhat, however, she does have pain with walking. In addition, I feel

that this patient is disabled for any type of occupation unless she were to be trained in some type of sedentary occupation, however, I would not like her to be in a sitting position continuously. Again, I feel that she is disabled as to any type of occupation other than as mentioned." [R. at 268].

Plaintiff was admitted on January 18, 1993 for a craniotomy and clipping of left posterior aneurysm. [R. at 386]. Plaintiff was discharged on January 22, 1993. [R. at 383].

Dr. Copple filled out but did not complete a RFC Evaluation for Plaintiff on March 15, 1993. He noted that Plaintiff could infrequently lift or carry five to 20 pounds, but could never carry or lift 21 pounds or greater. [R. at 19]. Dr. Copple noted that Plaintiff's ability to repetitively use her feet in pushing and pulling leg controls was limited. [R. at 20]. Dr. Copple noted that Plaintiff had edema in both of her legs, tenderness in her calves, and difficulty using her legs. [R. at 20].

Plaintiff was evaluated by Dr. Copple on January 14, 1994. Dr. Copple noted that Plaintiff was 45 years old and complained of headaches. [R. at 6]. Dr. Copple reported that Plaintiff had a prior history of a cerebral aneurysm which had been clipped and that Plaintiff had done well until June of 1992. [R. at 6]. Dr. Copple prescribed Dilantin for Plaintiff's headaches, and on January 26, 1994, noted that Plaintiff's headaches had decreased since she had begun using Dilantin. [R. at 6-12].

Plaintiff was seen in the emergency room on January 4, 1996, for right leg pain. Plaintiff was admitted on April 21, 1996, and discharged on April 26, 1996. Plaintiff's discharge diagnosis indicated pulmonary embolus and deep venous thrombosis. [R.

at 329]. Because of her history of deep venous thrombosis, Plaintiff had a greenfield filter placed in her inferior vena cava on April 21, 1996. [R. at 329]. Plaintiff's surgeon wrote that the filter was placed in Plaintiff because Plaintiff continued to evidence "multiple pulmonary emboli" despite "Coumadin therapy." [R. at 434]. On April 29, 1996, Plaintiff was seen in the emergency room because she was bleeding from her incision.

Dr. Davis completed a handicapped parking permit for Plaintiff on May 2, 1996. Dr. Davis indicated that Plaintiff was limited in her ability to walk, and described her disability as "permanent." [R. at 463].

Plaintiff was examined by Varsha Sikka, M.D., on August 27, 1996. Dr. Sikka noted that Plaintiff complained of pain in her leg, swelling in her legs and hands, and headaches. [R. at 355]. Dr. Sikka observed that Plaintiff had minimal edema in her lower extremities. Dr. Sikka completed a RFC indicating that Plaintiff could sit for two hours at a time, stand for one hour, and walk for one hour. In an eight hour day, Plaintiff could sit two hours, stand two hours, and walk one hour. [R. at 361]. Plaintiff's ability to lift and carry up to ten pounds was indicated at "continuously." [R. at 361]. In addition, the RFC records that Plaintiff can frequently lift 11 to 20 pounds, and occasionally lift 21 to 25 pounds. [R. at 361].

On February 17, 1997, Plaintiff was reported as having "moderate edema" of her left leg. [R. at 444].

H. Goldman, M.D., completed a RFC for Plaintiff on April 22, 1997. [R. at 479]. He noted that Plaintiff could sit for four hours at one time or six hours in a day,

stand for two hours at a time or two hours in a day, and walk for one hour at time or two hours in a day. [R. at 479]. He indicated that Plaintiff could continuously lift up to 20 pounds, frequently lift or carry up to 25 pounds, and occasionally lift or carry 26 to 50 pounds. [R. at 479]. Dr. Goldman testified at the hearing before the ALJ. He noted that Plaintiff had a history of aneurysm, headaches, and deep vein thrombosis in her left leg. According to Dr. Goldman, none of Plaintiff's medications would affect her driving or cause her excessive fatigue. [R. at 501].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

^{3/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to

^{4/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ noted that the medical record revealed Plaintiff has phlebitis and thrombophlebitis of her left leg, hypertension, and a history of aneurysm. The ALJ concluded that Plaintiff had the residual functional capacity ("RFC") to perform a wide range of medium work, and that this RFC was compatible with Plaintiff's past relevant work. The ALJ concluded, at Step Four, that Plaintiff could perform her prior work.

IV. REVIEW

Plaintiff asserts that the ALJ improperly evaluated the evidence from Plaintiff's treating physician. The Court agrees.

Dr. Dalessandro, who treated Plaintiff, noted in February of 1992, that "at this time there is definite inability of this patient to use her left extremities at 100%. Since

it has been over six (6) months since the episode, it is my opinion the left extremity will not improve." [R. at 169].

Dr. Copple, who treated Plaintiff, in December of 1992, observed that Plaintiff had pain and cramping in her left leg with "any attempt at ambulation." [R. at 267]. He concluded that her condition would interfere with any gainful occupation "particularly that requiring any effort at being on her feet. I do feel that she can ambulate somewhat, however, she does have pain with walking. In addition, I feel that this patient is disabled for any type of occupation unless she were to be trained in some type of sedentary occupation, however, I would not like her to be in a sitting position continuously. Again, I feel that she is disabled as to any type of occupation other than as mentioned." [R. at 268].

In the RFC Evaluation which was partially completed by Dr. Copple in March of 1993, he wrote that Plaintiff's ability to repetitively use her feet in pushing and pulling leg controls was limited. [R. at 20]. Dr. Copple noted that Plaintiff had edema in both of her legs, tenderness in her calves, and difficulty using her legs. [R. at 20].

Plaintiff was also treated by Dr. Davis. Dr. Davis completed a handicapped parking permit for Plaintiff on May 2, 1996, and wrote that Plaintiff was limited in her ability to walk. Dr. Davis described Plaintiff's disability as "permanent." [R. at 463].

Plaintiff was examined by Varsha Sikka, M.D., on August 27, 1996. Dr. Sikka observed that Plaintiff had minimal edema in her lower extremities. Dr. Sikka completed a RFC indicating that Plaintiff could sit for two hours at a time, stand for

one hour, and walk for one hour. In an eight hour day, Plaintiff could sit two hours, stand two hours, and walk one hour. [R. at 361].

On February 17, 1997, Plaintiff was reported as having "moderate edema" of her left leg. [R. at 444].

Plaintiff was treated by Dr. Copple. Dr. Copple concluded that Plaintiff had difficulty with ambulation and could perhaps be retrained for a sedentary position but that he would not want her to sit for too long. Plaintiff was treated by Dr. Dalessandro. He noted that Plaintiff's ability to use her left extremity would not likely improve. Plaintiff was treated by Dr. Davis. Dr. Davis completed a handicapped parking permit for Plaintiff and wrote that Plaintiff's ability to walk was permanently affected. Plaintiff was examined by Dr. Sikka. Dr. Sikka concluded that Plaintiff could perform work-type activities for only five hours in an eight hour day. Although the degree of limitation noted by each of Plaintiff's doctors differs, Plaintiff's treating and examining doctors are consistent in that none of them suggest Plaintiff is capable of performing medium work.

The ALJ, to resolve the "inconsistency in the medical evidence," called an expert witness at the hearing. At the hearing Dr. Goldman noted some of the contradictions in the submissions by Plaintiff's treating and examining doctors. For example, he noted that Dr. Copple wrote that Plaintiff could not repetitively use her feet whereas Dr. Sikka indicated that Plaintiff could repetitively use her feet. [R. at 298]. Dr. Goldman additionally believed that Dr. Sikka's conclusion that Plaintiff could

walk for only one hour in an eight hour day although Dr. Sikka indicated Plaintiff could repetitively use her feet was contradictory. [R. at 499].

The ALJ notes Dr. Goldman's testimony at the hearing, and observes that Goldman evaluated Dr. Sikka's RFC. [R. at 295]. Dr. Sikka, an examining physician, concluded Plaintiff could sit for only two hours, stand for one hour, and walk for one hour, for a total of five hours in an eight hour day. Dr. Copple, a treating physician, had not completed the RFC categories, but had noted that Plaintiff could not repetitively use her feet. [R. at 295]. The ALJ noted that Dr. Goldman testified that Dr. Copple's and Dr. Sikka's evaluations did not "add up." Dr. Goldman prepared an RFC indicating that Plaintiff could walk for two hours in an eight hour day, stand for two hours, and sit for six hours.

The ALJ notes that the opinion of a treating physician should be given considerable weight. He then declines to give weight to the opinion of Plaintiff's treating physician based on the following reasoning:

Although Dr. Copple limited claimant to lifting 20 pounds infrequently, and carrying up to 10 pounds infrequently, no bilateral lower extremity repetitive foot movements, numerous postural limitations, and unprotected heights and moving machinery exposure limitations due to edema of both legs, bilateral calf tenderness, and "difficulty or uncomfortableness" with any use of leg controls, Dr. Sikka's report noted only minimal edema. Dr. Goldman questioned why her physician would advise claimant not to walk, because exercise would be therapeutic to deep vein thrombosis although elevating her [sic] leg was good advice.

Accordingly, the undersigned gives greater weight to the opinion of the Medical Expert than to claimant's treating physician as being more consistent with the overall medical record and as being a complete residual functional capacity.

The undersigned therefore finds that the medical record is consistent with a residual functional capacity for no more than the occasional lifting up to 50 pounds, no more than the occasional lifting or carrying up to 25 pounds, no more than the continuous lifting up to 20 pounds, walking no more than 1 hour, standing no more than 2 hours, and sitting no more than 4 hours at a time.

[R. at 295].

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and

(6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

In this case, the ALJ did not specifically consider any of the factors listed. Instead, the ALJ decided to accept the opinion of the "medical expert" as being a more complete opinion and more consistent with the record. The Court has reviewed the record, and none of Plaintiff's doctors support the final conclusions of the medical expert upon whom the ALJ relied. In addition, as noted by Plaintiff, although Plaintiff submitted, on two separate occasions, additional documents supporting Plaintiff's claims, the documents do not appear in the record and the documents were not provided to the medical expert. Also, although the medical expert concluded that Plaintiff did not have evidence of edema, the record mentions minimal to moderate edema. Furthermore, Plaintiff testified that she consistently elevates her feet, and the medical expert acknowledged that Plaintiff would have less edema if she did elevate her feet. Finally, although the medical expert noted some discrepancies in Dr. Copple's 1993 conclusion and Dr. Sikka's 1996 opinion, the passage of time (the three years between the opinions) was never considered by the medical expert or the ALJ.^{5/} If Plaintiff was disabled for any continuous one year period during the time period Plaintiff claims disability, Plaintiff may be entitled to benefits for a closed period of time.

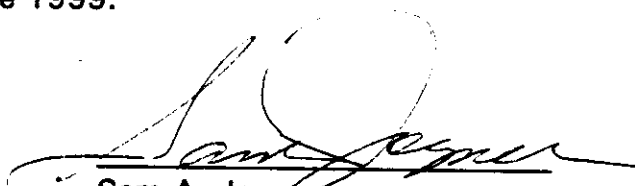
^{5/} Dr. Copple concluded that Plaintiff could not repetitively use her feet. Dr. Sikka noted that Plaintiff could repetitively use her feet but could not walk for longer than one hour.

V. CONCLUSION

On remand the ALJ should evaluate the opinions of Plaintiff's treating physicians in accordance with the relevant case law.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED**.

Dated this 7th day of June 1999.



Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

NORMAN LEE NEWSTED,

Petitioner,

v.

RON WARD, Warden,
Oklahoma State Penitentiary,

Respondent.

ENTERED ON DOCKET

DATE JUN 8 1999

Case No. 91-CV-914-H ✓

FILED

JUN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

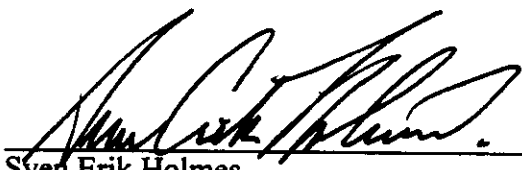
J U D G M E N T

This matter came before the Court on Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court granted a conditional writ to Petitioner, which both Petitioner and Respondent appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit remanded the cause to the Court, "for entry of an order denying the petition." Newsted v. Ward, 158 F.3d 1085, 1101 (10th Cir. 1998). Upon the Tenth Circuit issuing its mandate, the Court accordingly followed the directive of the Tenth Circuit and denied Petitioner's application for writ of habeas corpus.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

IT IS SO ORDERED.

This 2nd day of June, 1999.


Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID AND MARISA EAST,
individually and on behalf of
JOSHUA GLENN EAST, a
minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No.

FILED
JUN 7 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT
99CV0394H (J)

ENTERED ON DOCKET

DATE JUN 8 1999

JUDGMENT

NOW on this 7TH day of ~~March~~ JUNE, 1999, comes on before me, the undersigned United States District Judge, the above styled and numbered cause. This Judgment is entered by consent of Plaintiffs and Defendant, pursuant to their approval hereon. The Court has also reviewed the facts and circumstances of this case and, on behalf of the minor child, approved this settlement as being in said minor's best interest.

The Court finds that the settlement of \$40,000 payable by Defendant to Plaintiff should be approved. From that sum, the amount of \$8,165 .00 should be paid to Plaintiffs' attorneys as and for fees and costs. Of the remainder, \$1,000.00 should be paid to Plaintiffs as and for compensation for past medical expenses, medical expenses in the future until the minor reaches the age of eighteen (18)


years, and loss of services of the minor. The remaining amount, the sum of \$30,835.00 should be placed in the Tulsa Federal Employees Credit Union, pending the minor, Joshua Glenn East, DOB 16 November 1986, SSN: 610-30-8838, reaching the age of eighteen (18) years on 16 November, 2004. Said funds are not to be removed from the account prior to that date, except upon application and approval by this Court. This Court specifically retains jurisdiction to hear and rule upon any such application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs recover of Defendant the sum of \$40,000 with interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the sum of \$30,835.00 be placed in the Tulsa Federal Employees Credit Union, not to be removed from said account without further order of this Court or until Joshua Glenn East reaches the age of eighteen (18) years on 16 November, 2004, at which time said sums can be removed by him without further order of this Court, all pursuant to 12 O.S. § 83.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the remaining funds paid to Plaintiffs by Defendant be distributed as above set forth.

For all of which let execution issue.



United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROLYN FRAMPTON,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,
individually and d/b/a SURGITEK/MEDICAL
ENGINEERING CORP. and BRISTOL MYERS
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN 8 1999

Civil Action No.: 97CV884 H(W)

FILED

JUN 7 1999

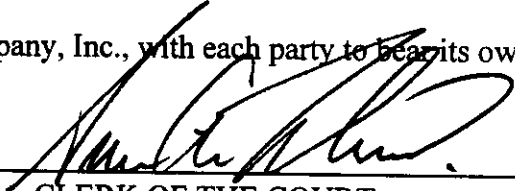
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Carolyn Frampton and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: 6/7/99


CLERK OF THE COURT

U.S. District Judge

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
MEDICAL ENGINEERING CORPORATION,
INDIVIDUALLY AND D/B/A SURGITEK/
MEDICAL ENGINEERING CORP. AND
BRISTOL MYERS SQUIBB COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
- FOR THE NORTHERN DISTRICT OF OKLAHOMA

WEBCO INDUSTRIES, INC.,

Plaintiff,

v.

THERMATOOL CORP. and
ALPHA INDUSTRIES, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN 8 1999

Case No. 97-CV-708-H ✓

FILED

JUN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

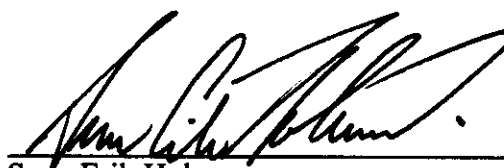
J U D G M E N T

This matter came before the Court for a trial by jury from May 17, 1999, to May 27, 1999. On May 27, 1999, the jury returned its verdict finding that Plaintiff Webco Industries, Inc. ("Webco") had proved its claim of breach of contract against Defendants Thermatool Corp. and Alpha Industries, Inc. (hereinafter collectively referred to as "Thermatool"). Accordingly, the jury awarded Webco \$1,115,500 in damages.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Webco and against Thermatool in the amount of \$1,115,500.

IT IS SO ORDERED.

This 7TH day of June, 1999.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHIRLEY SANDS,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,
individually and d/b/a SURGITEK/MEDICAL
ENGINEERING CORP. and BRISTOL MYERS
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN 8 1999

Civil Action No.: 97CV885 H(M)

FILED

JUN 7 1999

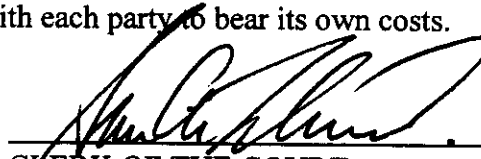
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Shirley Sands and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: 6/7/99


CLERK OF THE COURT

U.S. District Judge

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
MEDICAL ENGINEERING CORPORATION,
INDIVIDUALLY AND D/B/A SURGITEK/
MEDICAL ENGINEERING CORP. AND
BRISTOL MYERS SQUIBB COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR NORTHERN DISTRICT OF OKLAHOMA

JADCO PURCHASING CORP and)
JADCO MANAGEMENT CORPORATION)

Plaintiffs,)

v.)

FEDERAL INSURANCE COMPANY,)
CHUBB AND SON, INC. d/b/a CHUBB)
GROUP OF INSURANCE COMPANY,)
CONSOLIDATED INSURANCE)
AGENCY, INC., and BILL WILSON)

Defendants.)

ENTERED ON DOCKET

DATE JUN 8 1999

Case No. 98CV817 H (J) ✓

FILED

JUN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment. For the reasons that follow, Defendants' motion is granted.

I.

This Court finds that Plaintiffs are precluded from pursuing any relief in this Court based upon Defendants' denial of their insurance claim. Plaintiffs concede their claim for the denial of the insurance claim was dismissed in *Jadco Purchasing Corp., et al v. Federal Ins. Co., et al*, CJ-96-1737 (Tulsa County) ("*Jadco II*") and is currently on appeal before the Oklahoma Supreme Court in *Jadco Purchasing Corp., et al v. Federal Ins. Co., et al*, Case No. 91,275. Plaintiffs also concede that this Court therefore cannot exercise jurisdiction over those claims because of claim preclusion and principles of federalism.

II.

Plaintiffs, however, argue that they may pursue a claim for bad faith based on Defendants' allegedly technical defenses raised during litigation over the denial of the insurance claim.

The Court finds as a matter of law that Defendants' defense of the prior litigation cannot constitute evidence of bad faith. Defendants successfully defended at least three prior lawsuits. Moreover, the law is replete with remedies to deal with the conduct of parties during litigation, including but not limited to recovery of costs and fees as well as sanctions under FED. R. CIV. P. 11.

III.

The Court also finds that Plaintiffs are barred by the statute of limitations from asserting a claim for bad faith arising solely from Defendants' defense of prior lawsuits for the denial of the claim. The statute of limitations for Plaintiffs' claim is two years. Plaintiffs alleged that Defendants' defense of *Jadco II* constituted bad faith in *Jadco Management Co., et al v. Federal Ins. Co., et al*, CJ 96-2788 (Tulsa County) (*Jadco III*). The issue is when that alleged claim accrued. *Jadco III* was filed on June 20, 1996. Defendants filed their Motion to Dismiss on July 12, 1996. The district court dismissed the lawsuit in an order dated September 18, 1996.

The Court finds that Plaintiffs' alleged claim for bad faith accrued no later than the filing of the motion to dismiss. Plaintiffs incurred damage by having to continue to expend money for the costs and fees required to pursue the lawsuit. Therefore, Plaintiffs failed to file their Complaint in this case within two years.

IV.

Finally, Plaintiffs deny they are relying upon Oklahoma's savings statute -- OKLA. STAT. tit. 12, § 100 -- to get around the statute of limitations. In any event, the savings statute would provide

no relief to Plaintiffs. Oklahoma's savings statute, affords only **one** refiling after the statute of limitations runs. *Ashby v. Harris*, 918 P.2d 744 (Okla. 1996). The question becomes which of the various lawsuits is the appropriate one to apply the savings statute.

Plaintiffs cannot use *Jadco IV* as the basis to refile their claims under the savings statute. Under Oklahoma law, "[w]here a new action is brought under the failure of a prior suit, the second suit must be based substantially upon the same cause of action, and the parties in each suit must be substantially the same." *C & C Tile Co. v. Independent School District No. 7*, 503 P.2d 554 (Okla. 1972) (relying upon *Haught v. Continental Oil Co.*, 136 P.2d 691 (Okla. 1943)). *Jadco IV* involved a different plaintiff than the Plaintiffs in this lawsuit. In fact, the court in *Jadco IV* held that the plaintiff in that case was a nonentity. Therefore, Plaintiffs must use *Jadco III* as the basis for applying the savings statute.

However, the savings statute's one-year time period has expired since the dismissal of *Jadco III*. *Jadco III* was dismissed on September 18, 1997. The current lawsuit was filed on September 4, 1998 - well after the expiration of the one year time period. Accordingly, Defendants' Motion for Summary Judgment is granted.

The Court hereby grants summary judgment in favor of Defendants.

IT IS SO ORDERED.

DATED this 7TH day of ~~May~~ ^{JUNE}, 1999.



Judge Sven Erik Holmes
U.S. Court for the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THOMAS J. ALMOND and
JACQUELINE ALMOND,

Plaintiffs,

v.

JOHN EVERETT ARBUCKLE and
CONTINENTAL EXPRESS, S.D., INC.,
a South Dakota corporation, F/K/A
DALLAS CARRIERS CORP., a Texas
corporation,

Defendants.

ENTERED ON DOCKET

DATE JUN 8 1999

Case No. 98 CV 0555H(M) ✓

FILED

JUN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

The above matter comes on to be heard this 7TH day of JUNE, 1999, upon the written stipulation of the parties for a dismissal of said action with prejudice, and the Court, having examined said stipulation, finds that the parties have entered into a compromise settlement covering all claims involved in the action, and the Court, being fully advised in the premises, finds that said action should be dismissed pursuant to said stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs' cause of action filed herein against the defendants be, and the same is hereby, dismissed with prejudice to any future action.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ARTHUR NEAL,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

ENTERED ON DOCKET
JUN 8 1999
DATE _____

Case No. 98 CV-846 H (E) ✓

FILED

JUN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

THIS MATTER comes before the Court upon the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 7TH day of ~~May~~ ^{June}, 1999.



U.S. DISTRICT JUDGE

Prepared by:

JOHN A. GLADD OBA #3398
Attorney for Defendant
2642 East 21st Street, Suite 150
Tulsa, Oklahoma 74114-1739
Phone: 918-744-5657 * Fax: 918-742-1753

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KARLA R. HARRIS,

Plaintiff,

v.

ARROW SPEED WAREHOUSE, INC.,

Defendant.

ENTERED ON DOCKET

DATE **JUN 8 1999**

Case No. 98-CV-458-H ✓

FILED

JUN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff Karla R. Harris's motion to dismiss this action with prejudice (Docket # 9). Pursuant to this motion and for good cause shown, Plaintiff's motion is granted, and this action is hereby dismissed with prejudice.

IT IS SO ORDERED.

This 7TH day of ~~May~~ ^{June}, 1999.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHARON DAVIES,

Plaintiff,

vs.

MEDICAL ENGINEERING
CORPORATION, individually and d/b/a
SURGITEK/MEDICAL ENGINEERING
CORP. and BRISTOL MYERS SQUIBB
COMPANY, INC.,

Defendants.

ENTERED ON DOCKET
DATE JUN 8 1999

Civil Action No. 97CV 1106H(J)

FILED
JUN 7 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Sharon Davies and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: 6/7/99


CLERK OF THE COURT

U.S. District Judge

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
MEDICAL ENGINEERING CORPORATION,
INDIVIDUALLY AND D/B/A SURGITEK/
MEDICAL ENGINEERING CORP. AND
BRISTOL MYERS SQUIBB COMPANY, INC.

F I L E D

JUN - 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHARON COOK,

Plaintiff,

vs.

IMPAC HOTEL GROUP,

Defendant.

No. 98-C-420-B

ENTERED ON DOCKET

DATE JUN 07 1999

ORDER


Comes on for pretrial the above-captioned case and the parties failed to appear or file application for continuance. The Court further notes nothing has been filed in this case since entry by the Court of Scheduling Order on or about December 14, 1998.

Attempts by the Court Clerk to reach counsel for Plaintiff resulted in a recording stating the number had been disconnected.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case be dismissed without prejudice for failure to prosecute pursuant to Fed. R.Civ.P. 41. (b).

Each party shall bear their own costs and attorney's fees.

DONE THIS 4th DAY OF JUNE, 1999.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN -7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GAIL M. McELYEA,
SSN: 456-94-7693,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0683-EA ✓

ENTERED ON DOCKET

DATE JUN 7 1999

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ORDERED this 7th day of June, 1999.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUN -7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VIVIAN S. SMITH,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of the Social Security Administration,

Defendant.

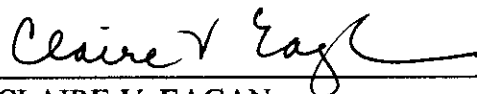
Case No. 96-CV-1155-EA

ENTERED ON DOCKET
JUN 7 1999
DATE _____

ORDER

This case is hereby reversed and remanded in accordance with the Tenth Circuit Court of Appeals' Order and Judgment filed in this Court on May 28, 1999.

SO ORDERED this 7th day of June, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN -7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOUISE L. LEWIS,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of the Social Security Administration,

Defendant.

Case No. 96-CV-0971-EA

ENTERED ON DOCKET

DATE JUN 7 1999

ORDER

This case is hereby reversed and remanded in accordance with the Tenth Circuit Court of Appeals' Order and Judgment filed in this Court on May 28, 1999.

SO ORDERED this 7th day of June, 1999.

Claire V Eagan

CLAIRE V. EAGAN

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KAREN LANDRUM,

Plaintiff,

v.

DAN BOONE,

Defendant.

Case No. 99-C-240-C

FILED

JUN - 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 04 1999

ORDER

Before the Court is defendant, Dan Boone's, motion to dismiss the present action pursuant to F.R.C.P. 12(b)(6).

On April 1, 1999, plaintiff, Karen Landrum, filed the present action, alleging a violation of the Violence Against Women Act, 42 U.S.C. § 13981, and further alleging state claims of sexual assault and battery and intentional infliction of emotional distress. These allegations stem from alleged sexual assaults perpetrated by Boone from 1972 through 1975. On May 14, 1999, Boone filed the present motion to dismiss for failure to state a claim upon which relief can be granted. Although the deadline for Landrum to respond to Boone's motion was June 1, no response has been filed, nor has Landrum sought additional time in which to respond.

Pursuant to Local Civil Rule 7.1(C), the failure to timely respond to a motion authorizes the Court to deem the matter confessed and enter the relief requested. In light of Landrum's failure to either respond to Boone's motion or otherwise seek additional time in which to respond, the Court hereby deems Boone's motion confessed.

Accordingly, Boone's motion to dismiss is hereby GRANTED.

IT IS SO ORDERED this 3rd day of June, 1999.


H. DALE COOK
Senior United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCEOLA O. ANDERSON,
SSN: 445-44-5340

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUN 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-385-J

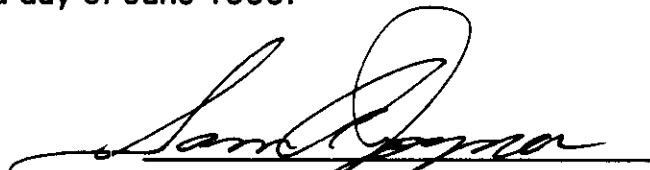
ENTERED ON DOCKET

DATE JUN - 4 1999

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's decision and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 3rd day of June 1999.



Sam A. Joyner
United States Magistrate Judge

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

OCEOLA O. ANDERSON,
SSN: 445-44-5340

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

JUN 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-385-J

ENTERED ON DOCKET

DATE JUN - 4 1999

ORDER^{1/}

Plaintiff, Oceola O. Anderson, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ's findings were not supported by substantial evidence and the ALJ did not consider Plaintiff's asthma in his evaluation, (2) the ALJ's finding that Plaintiff's past relevant work qualified as sedentary work was not supported by the evidence, and (3) the ALJ improperly delegated the Step Four decision to the vocational expert. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{2/} Administrative Law Judge Leslie S. Hauger, Jr. (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated July 30, 1996. [R. at 16]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 15, 1998. [R. at 6].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born September 22, 1941, and completed the 11th grade. [R. at 349]. Plaintiff testified, at her hearing before the ALJ on July 17, 1996, that she lived alone and was diabetic. Plaintiff stated that her neck hurt, that her feet hurt and burned, and that she had bad nerves and high blood pressure. [R. at 351 - 354].

According to Plaintiff, she sometimes baby sat, for approximately two to three hours every other day, a seven and twelve year old. [R. at 355, 368]. Plaintiff acknowledged that she did some cooking, but stated that she slept most of the time. [R. at 355-56]. Plaintiff stated that she cannot be around cigarette smoke.

Plaintiff initially testified that she could not lift over 30 pounds, but later stated that she could probably lift no more than 20 pounds. [R. at 359, 361]. Plaintiff stated that she could stand for about ten minutes, and walk approximately 20 minutes. [R. at 359]. Plaintiff additionally testified that she hears voices, suffers from depression, uses her asthma machine on a daily basis, and has suicidal thoughts. [R. at 370]. Plaintiff additionally stated that her hands shook so she would be unable to lift things. [R. at 378].

An RFC Assessment on September 5, 1990 indicated that Plaintiff had a history of asthma and should avoid exposure to dust and fumes. The RFC otherwise indicated that Plaintiff had no exertional limitations. [R. at 42].

Janice C. Boon, Ph.D., completed a mental RFC on August 8, 1991. She indicated that Plaintiff was moderately limited in her ability to remember and carry out instructions, and markedly limited in her ability to interact with the general public. [R.

at 58]. A PRT was completed by Dr. Boon on the same date. She indicated that Plaintiff has a moderate restriction of activities of daily living, moderate difficulties in maintaining social functioning, seldom deficiencies of concentration, persistence, or pace, and no episodes of deterioration in work settings. [R. at 68]. A PRT completed June 21, 1995, by R. Smallwood, Ph.D., noted that Plaintiff's asserted mental impairment was "not severe." [R. at 80]. Dr. Smallwood also wrote that Plaintiff had a slight restriction of activities of daily living, slight difficulties in maintaining social functioning, seldom deficiencies of concentration, persistence, or pace, and no episodes of deterioration in work settings. Carolyn Goodrich, Ph.D., evaluated Plaintiff on August 16, 1995. She concluded that Plaintiff's impairment was "not severe." [R. at 97]. She additionally noted that Plaintiff had an adjustment disorder with depressive features. [R. at 97]. The PRT indicates Plaintiff had no restriction of activities of daily living, slight difficulties in maintaining social functioning, seldom deficiencies of concentration, persistence, or pace, and no episodes of deterioration in work settings. [R. at 97].

On June 10, 1990, Plaintiff wrote that she drove daily to pick up her grandson at grade school. [R. at 137].

In a pain questionnaire completed August 17, 1990, Plaintiff indicated that she slept approximately four to five hours a night and was unable to sleep longer due to her shortness of breath related to her asthma. [R. at 142]. Plaintiff went shopping one time each month for food and estimated that it took her 30 to 45 minutes to shop. Plaintiff stated that she was unable to stand or walk for a long period of time [R. at

142]. Plaintiff noted that she used her asthma machine as soon as she woke up each day. [R. at 142]. Plaintiff noted that she did some cooking and sometimes cleaned the dishes. [R. at 181]. Plaintiff claimed that her eyes were weak due to her diabetes.^{3/} [R. at 181].

The record contains several reports from Star Community Mental Health. [R. at 214 - 227]. On April 29, 1991, the record notes "It appears client is using therapy as a means to obtain social security." [R. at 220].

Plaintiff was admitted on September 5, 1991, complaining of abdominal pain. Plaintiff had surgery for appendicitis and was discharged. [R. at 233 - 241].

An August 11, 1993 x-ray was interpreted as an essentially normal chest x-ray considering Plaintiff's age. [R. at 264].

A June 10, 1995 social security examiner reported that Plaintiff had a "sympathy seeking attitude." [R. at 273]. A June 21, 1995 examiner noted asthma and diabetes as possible, and indicated that Plaintiff walked with a slightly slow gait but had "fine" dexterity. [R. at 278].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

^{3/} At a social security examination, the examiner reported her eyesight as 20/20. [R. at 279].

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).^{4/}

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir.

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

The ALJ concluded that Plaintiff can perform her past relevant work as a "social service counselor." The ALJ noted that Plaintiff visited her doctor for her asthma, but only occasionally, which the ALJ concluded was inconsistent with Plaintiff's claim of severe asthma. The ALJ concluded that Plaintiff had a nonsevere mental disorder. The ALJ additionally noted that Plaintiff babysat daily,^{6/} and concluded that because babysitting was stressful Plaintiff's complaints of inability to cope with stress were inconsistent with her daily activities. The ALJ concluded that Plaintiff was impaired by asthma and that "such impairment is severe enough to reduce the claimant's ability to work." [R. at 23]. The ALJ concluded that Plaintiff could perform a full range of sedentary work, and based on the testimony of a vocational expert, determined that Plaintiff could return to her past relevant work.

IV. REVIEW

SUBSTANTIAL EVIDENCE TO SUPPORT ALJ'S CONCLUSION

Plaintiff initially asserts that although she suffers from bronchial asthma and depression, the ALJ failed to consider these impairments in his conclusion that Plaintiff could return to her past relevant work.

Plaintiff testified that she could not work around smoke. The social security examiner noted that Plaintiff should avoid "dust and fumes." The ALJ specifically

^{6/} As pointed out by Plaintiff, the record does not support this conclusion. Although Plaintiff's testimony is confusing, Plaintiff appears to have testified that she babysat a 7 and 12 year old, every other day from approximately 3:30 until 5:30 or 6:00.

found that Plaintiff's asthma "reduced" her ability to work. However, the ALJ made no specific findings with regard to Plaintiff's past relevant work.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

....
[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

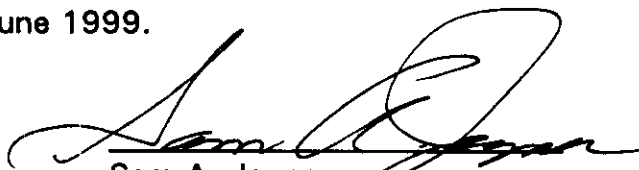
In this case, the ALJ does refer to Plaintiff's past relevant work but writes only that it was "at a sedentary exertional level"^{7/} and was "semi-skilled." These findings do not sufficiently comply with the Social Security Regulations. Further, as noted above, although the ALJ makes a finding that Plaintiff's asthma impairs, to some degree, her ability to work, the ALJ makes no reference to whether or how this would affect Plaintiff's ability to perform her past relevant work.

V. CONCLUSION

The medical evidence supporting Plaintiff's claims of disability is, at best, scant. Plaintiff had an appendectomy. Plaintiff has asthma and diabetes. Very little in the record indicates limitations which have been placed upon Plaintiff due to her medical impairments. However, the ALJ specifically found that Plaintiff had asthma which interfered with her ability to work, yet neglected to evaluate the effect of Plaintiff's asthma on her past relevant work. On remand, the ALJ should specifically address the affect of Plaintiff's asthma and provide a more detailed Step Four analysis.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED**.

Dated this 3 day of June 1999.


Sam A. Joyner
United States Magistrate Judge

^{7/} Plaintiff additionally asserts that some of her past relevant work job duties are more appropriately classified as "light work" rather than sedentary.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARVEY CAPSTICK,
Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS
OF CREEK COUNTY, et al.,

Defendants.

ENTERED ON DOCKET

JUN 4 1999

DATE

No. 98-CV-467-K

FILED

JUN 04 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

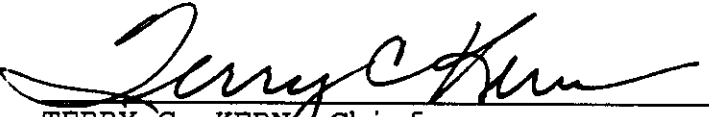
Before the Court is the motion of the defendant Board of County Commissioners of Creek County, Larry Fugate, and Ed Willingham, for summary judgment. By Order filed April 14, 1999, the Court granted the motion of these defendants to dismiss, dismissing them from this action without prejudice. Therefore, these defendants are no longer parties to the action and it is not appropriate to file a motion for summary judgment.

By Order filed February 23, 1999, the Court granted leave for plaintiff's counsel to withdraw, subject to plaintiff causing new counsel to appear or filing a statement he wished to proceed pro se. The Order stated: "Failure to do so may result in the imposition of dismissal or other appropriate sanctions." A time limit of 20 days was imposed, which has long since passed. Accordingly, notice having been given, the Court elects to dismiss this case for failure of prosecution.

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It is the Order of the Court that the motion of the defendants Board of County Commissioners of Creek County, Oklahoma, Larry Fugate and Ed Willingham for summary judgment (#22) is hereby DENIED. Pursuant to Rule 41(b) F.R.Cv.P., the action is dismissed in its entirety without prejudice for failure to prosecute. The Court Clerk is directed to administratively close this case.

ORDERED this 3 day of June, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

new
5-13-99

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH JOHNSTON and DIANA RUSS,
individually and on behalf of all others similarly
situated,

Plaintiffs,

vs.

VOLUNTEERS OF AMERICA OKLAHOMA, INC.,

Defendant.

No. 96-CV-1166K ✓
(Consolidated with
97-CV-740 K)

ENTERED ON DOCKET
DATE JUN 4 1999

FILED
JUN 04 1999
Lombardi, Clerk
DISTRICT COURT

JUDGMENT

This matter arising under the Fair Labor Standards Act came before the Court for consideration upon Defendant's Motion for Summary Judgment. After having duly considered the issues raised and deciding them in an Order filed on April 9, 1999, and after having been advised of the parties' stipulation as to the amount of damages, costs and attorneys' fees, the Court has determined that Plaintiffs are entitled to judgment in their favor.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the remaining fifty Plaintiffs, inclusive of damages, costs and attorneys' fees, as follows:

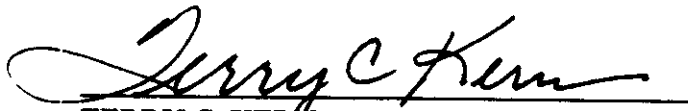
<u>NAME</u>	<u>AMOUNT</u>
Deborah Johnston	\$8,396.63
Diana Russ	\$8,293.43
Bridget A. Ames	\$2,369.02
Russell Applegate (dec.)	\$9,811.34
Norma L. Applegate	
Sharon Bates	\$1,743.03
Betty J. Baucom	\$178.70

<u>NAME</u>	<u>AMOUNT</u>
Helen Berry	\$6,813.80
Pamela Brown Berry	\$1,431.38
Jimmy Bostic	\$4,781.99
Aleta Britt	\$7,385.41
Angeline C. Brooks	\$1,122.16
Shawnda L. Brown	\$4,857.05
Dawna Campell	\$4,918.80
Jonathan Coleman	\$178.70
Edna J. Crabtree	\$570.94
Priscilla Crume	\$3,553.38
Sandra D. Deville	\$3,100.95
Tracy Emerson	\$1,329.52
Tina M. English	\$178.70
Lakeesha Gibbons	\$1,471.59
Linda Hall	\$1,254.47
Darren J. Hannah	\$373.93
Pat Harper	\$3,368.03
Kimberly Jones	\$1,283.06
Rosie M. Jones	\$602.04
Kelly J. Kaulay	\$488.44
Christi G. King	\$6,938.45
Alysa L. Kinnell	\$178.70
Thomas Lawrence, Jr.	\$394.03
Queen E. Lewis	\$981.95
Marie A. Maxwell	\$178.70
Patricia R. McCarrell	\$4,712.30

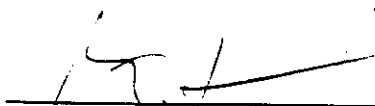
<u>NAME</u>	<u>AMOUNT</u>
Sean McDaniel	\$4,964.27
Charles W. Mulanax	\$1,275.91
Lugena Nwaiwa	\$2,469.73
Terrell T. Palmer	\$6,189.25
Sandra K. Peterson	\$323.00
Loverl Ramsey	\$896.36
Yolanda Ramsey	\$3,045.04
Tracy Richard	\$662.08
Tilequa L. Savage	\$402.07
Miriam Serwanga	\$584.35
Patricia L. Staley	\$4,034.48
Teri Vaught	\$3,266.80
Teresa Veales	\$4,303.78
Ernest Walston	\$1,927.27
Jerild A. Walston	\$3,366.69
Karla Walston	\$1,600.02
Rhonda A. Wheeler	\$5,386.98
Sandra Wilkins	\$2,061.30
<u>Total</u>	\$140,000.00,

with interest thereon at the rate of 4.879%, as provided by law.

IT IS SO ORDERED this 28 day of May, 1999.


TERRY C. KERN
United States District Judge

APPROVED AS TO FORM:



Steven R. Hickman
Attorney for Plaintiffs



Jo Anne Deaton
Attorney for Defendant, Volunteers of America Oklahoma, Inc.

JAD/bjo
673-60

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY LEE SIMS,

Petitioner,

vs.

STANLEY GLANZ,

Respondent.

ENTERED ON DOCKET

DATE ~~JUN 4 1999~~

Case No. 99-CV-86-K (J) ✓

FILED

JUN 04 1999

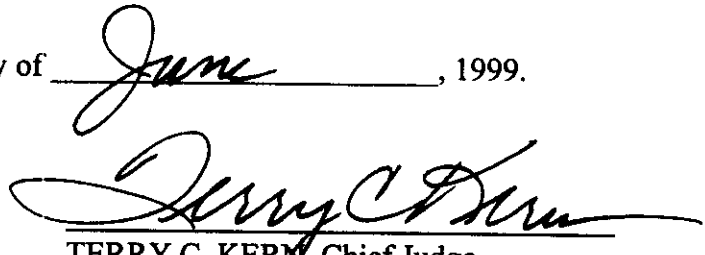
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2241 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 3 day of June, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

GARY LEE SIMS,

Petitioner,

vs.

STANLEY GLANZ,

Respondent.

ENTERED ON DOCKET

DATE **JUN 4 1999**

Case No. 99-CV-86-K(J) ✓

FILED

JUN 04 1999

ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Petitioner has filed a pre-trial detainee habeas claim under 28 U.S.C. § 2241(c)(3). See Doc. No. 12, amending No. 6. At the time his Petition was filed, Petitioner was being held pending trial on state charges in the Tulsa County Jail. In his Petition, Petitioner alleges that he is being illegally detained because there was insufficient evidence presented at his preliminary hearing, and because he received ineffective assistance of counsel at his preliminary hearing. See Doc. Nos. 3 and 12.

On April 19, 1999, the Court issued an Order requiring Respondent to file a motion to dismiss or show cause why the writ requested by Petitioner should not be granted. See Doc. No. 14. Respondent has filed his motion to dismiss pursuant to the Court's April 19th Order. See Doc. No. 15. Respondent argues that this case should be dismissed because it is moot.

In his motion to dismiss, Respondent informs the Court that Petitioner was tried and acquitted on the state charges on May 10-11, 1999. See Doc. No. 15, Exhibit "A," State Court Docket Sheet. Petitioner was then released from custody on May 12, 1999.

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Based on the information provided by Respondent, the Court finds Petitioner's pre-trial detainee habeas claim has been rendered moot. Consequently, the Court hereby **GRANTS** Respondent's motion to dismiss (Doc. No. 15) and **DISMISSES THIS ACTION WITHOUT PREJUDICE AS MOOT.**

SO ORDERED THIS 3 day of June 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARYLAND INSURANCE COMPANY,

Plaintiff,

vs.

SOONER FREIGHT, INC.,

Defendant.

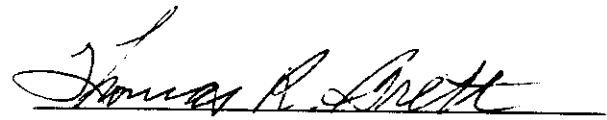
No. 98-C-427-B(E) ✓

ENTERED ON DOCKET
JUN 03 1999
DATE

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of Defendant Sooner Freight, Inc. and against Plaintiff Maryland Insurance Company. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1. Any claim for attorney's fees must be timely filed pursuant to Local Rule 54.2.

DATED, THIS 2nd DAY OF JUNE, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN - 2 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARYLAND INSURANCE COMPANY,

Plaintiff,

vs.

SOONER FREIGHT, INC.,

Defendant.

No. 98-C-427-B(E)

ENTERED ON DOCKET

DATE JUN 03 1999

ORDER

Before the Court are the cross-motions for summary judgment filed by plaintiff Maryland Insurance Company ("Maryland") (Docket No. 10) and defendant Sooner Freight, Inc.. ("Sooner") (Docket No. 11). The parties seek summary judgment on the applicability of insurance coverage under a commercial general liability policy issued by Maryland, Policy No. EPA10751767 (the "policy"), for a fire loss to property held in storage by Sooner in a rented warehouse.

A fire occurred at a warehouse owned by Helmerich & Payne and rented by Sooner on March 25, 1992, damaging the warehouse and its contents. At the time of the fire, Sooner was a bailee of personal property owned by Carapace, a Texas corporation. In 1993 Carapace sued Sooner in the District Court of Tulsa County for compensation for property loss Carapace allegedly sustained as a result of the fire (hereinafter referred to as the "underlying action"). As Sooner was insured by Maryland under the policy at

16

Parties Phil...

the time of the fire, Sooner sought a defense of the underlying action and indemnity from Maryland for Carapace's claims against Sooner. Maryland has denied its obligation to indemnify Sooner for Carapace's claims, but has and is still providing a defense to these claims. Maryland commenced this declaratory judgment action claiming it is not required to indemnify Sooner for the claims against it in the underlying action.

The policy provides that Maryland will pay those sums that the policyholder becomes legally obligated to pay as damages due to "property damage" to which the insurance applies. The coverage extends to all property damage caused by an "occurrence" that takes place in the "coverage territory" and which occurs during the policy period. Subsection 2 of the policy contains various exclusions which limit the coverage provided and are listed in subparagraphs (a) through (n). In support of its position of noncoverage, Maryland relies on exclusion 2(j)(4) which states:

This insurance does not apply to:

j. "Property damage" to:

(4) Personal property in the care, custody or control of the insured.

Although Sooner does not dispute that the Carapace property was in its "care, custody or control" at the time of the fire, Sooner urges that this exclusion, like all the exclusions under 2(c) through 2(n), is subject to the following qualification which "reaffirms" coverage:

Exclusions c. through n. do not apply to damage by fire to premises rented to you. A separate limit of insurance applies to this coverage as described in LIMITS OF INSURANCE (SECTION III).

Maryland contends this qualification is merely an exception to the exclusions, including

the "care, custody and control" exclusion, for "damage by fire to **premises** rented to [Sooner]"; and as "premises" unambiguously denotes land and its buildings, the exception does not apply to the bailed personal property at issue.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

[t]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Both parties agree the issue for determination is one of contract interpretation and thus an issue of law properly before the Court on summary judgment. “An insurance policy, like any other contract of adhesion, is liberally construed, consistent with the object sought to be accomplished, so as to give a reasonable effect to all of its provisions, if possible.” *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). “The construction of an insurance policy should be a natural and reasonable one, fairly constructed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result.” *Id.* In interpreting the policy, the Court must first determine if the pertinent terms are clear, consistent and unambiguous. If so, then the Court must accept the terms in their ordinary sense to determine the parties’ express intent. *Phillips v. Estate of Greenfield*, 859 P.2d 1101, 1104 (Okla. 1993). The interpretation of the policy and whether the pertinent terms are ambiguous are matters of law. *Dodson*, 812 P.2d at 376. If the Court finds the terms ambiguous, *i.e.*, susceptible of two meanings, the Court must liberally construe terms of inclusion in favor of the insured and strictly construe terms of exclusion against the insurer. *Phillips*, 859 P.2d at


Viewing the “exception” in the context of the “exclusions” in Subsection 2 of the Policy, the Court finds the language unambiguously eliminates the exclusions under 2(c) through 2(n) when damage occurs “by fire to premises rented to” the policyholder. To read the exception, as Maryland urges, to create coverage only for a loss to the policyholder’s rented premises when that loss is caused by fire would render it meaningless as an exception to a loss of “personal property in the care, custody or control of the insured.” Clearly, Maryland’s strained reading of the exception as applying only to land and its building would never be an “exception” to “personal property.” For example, Maryland’s proffered venn diagram depicting the “damage by fire to rented premises exception” as a subset of the “personal property in the care, custody or control exclusion” would not accurately represent any relation between the two unless the exception included personal property in the care, custody or control of the insured which was damaged by a fire to premises rented by the insured.¹ The Court thus finds the policy clearly and unambiguously provides coverage for the Carapace claims for damage to personal property resulting from a fire in the warehouse where the property was stored and which was rented by Sooner. Further, even if the language were ambiguous, the Court would make the same finding as it must “strictly construe terms of exclusion

¹ Sooner also notes that reading the exception as reaffirming coverage only for fire damage to the policyholder’s rented premises would render meaningless any application of the exception to exclusions 2(d) and (e) which expressly and exclusively concern only bodily injuries. The Court agrees.

against the insurer.” *Phillips*, 859 P.2d at 1104.

Accordingly, the Court grants Sooner’s motion for summary judgment (Docket No. 11) and denies Maryland’s motion for summary judgment (Docket No. 10).

IT IS SO ORDERED, THIS 2nd DAY OF JUNE, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

12f.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 3 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAMELA D. GOURLEY,

Plaintiff,

v.

Case No. 98 CV 966 K (J) ✓

WORTHINGTON INDUSTRIES,

an Ohio corporation, and

WORTHINGTON CYLINDER

CORPORATION, an Ohio corporation,

Defendants.

ENTERED ON DOCKET

DATE JUN - 3 1999

STIPULATION OF DISMISSAL

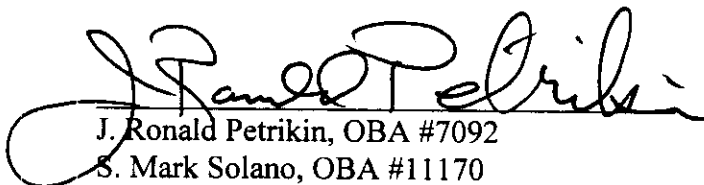
IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed without prejudice as to Defendant, Worthington Industries, and without costs to any party herein.

DATED this 3rd day of June, 1999.



Stephen O. Peters, OBA #11469
R. Lynn Thompson, OBA #13207
Harris McMahan & Peters, P.C.
1924 South Utica, Suite 700
Tulsa, OK 74104-6512
(918) 743-6201
(918) 747-2965 Fax

ATTORNEYS FOR THE PLAINTIFF,
PAMELA D. GOURLEY



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S. Mark Solano, OBA #11170
Nancy E. Vaughn, OBA #9214
CONNER & WINTERS
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15 East Fifth Street
Tulsa, OK 74103-4344
(918) 586-5711
(918) 586-8547 fax

ATTORNEYS FOR DEFENDANTS,
WORTHINGTON INDUSTRIES, and
WORTHINGTON CYLINDER CORPORATION

KK
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 3 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

APRIL D. STUBBLEFIELD,

Plaintiff,

v.

Case No. 98 CV 967 K (J) ✓

WORTHINGTON INDUSTRIES,
an Ohio corporation, and
WORTHINGTON CYLINDER
CORPORATION, an Ohio corporation,

Defendants.

ENTERED ON DOCKET
JUN - 3 1999
DATE _____

STIPULATION OF DISMISSAL

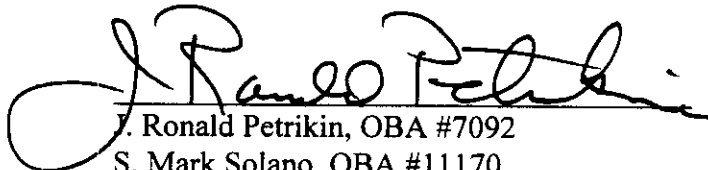
IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed without prejudice as to Defendant, Worthington Industries, and without costs to any party herein.

DATED this 3rd June day of ~~May~~, 1999.



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R. Lynn Thompson, OBA #13207
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ATTORNEYS FOR THE PLAINTIFF,
APRIL D. STUBBLEFIELD



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ATTORNEYS FOR DEFENDANTS,
WORTHINGTON INDUSTRIES, and
WORTHINGTON CYLINDER CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

APRIL K. BAILEY,

Plaintiff,

v.

Case No. 98 CV 965 K (M)

WORTHINGTON INDUSTRIES,
an Ohio corporation, and
WORTHINGTON CYLINDER
CORPORATION, an Ohio corporation,

Defendants.

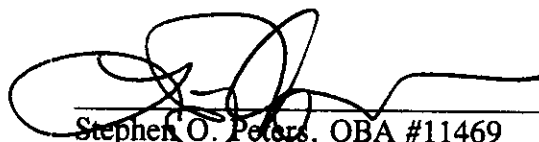
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DATE JUN - 3 1999

STIPULATION OF DISMISSAL

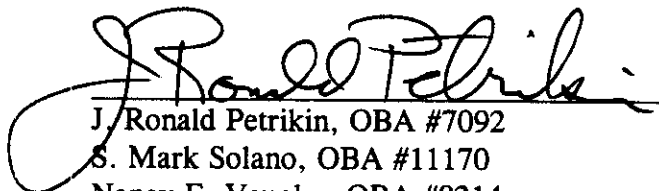
IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their undersigned counsel of record, that the above-entitled matter is dismissed without prejudice as to Defendant, Worthington Industries, and without costs to any party herein.

DATED this 3rd day of June, 1999.



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R. Lynn Thompson, OBA #13207
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APRIL K. BAILEY



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ATTORNEYS FOR DEFENDANTS,
WORTHINGTON INDUSTRIES, and
WORTHINGTON CYLINDER CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEE ANN ORRELL,

Plaintiff,

vs.

CASE & ASSOCIATES PROPERTIES,
INC.,

Defendant.

ENTERED ON DOCKET

DATE JUN - 3 1999

No. 98-CV-361-K ✓

F I L E D

JUN 02 1999 *SK*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding, and the issues having been duly heard and a verdict having been duly rendered,

IT IS THEREFORE ORDERED that, regarding plaintiff's claim under the Oklahoma Workers' Compensation Act, the Plaintiff Lee Ann Orrell recover of the Defendant Case & Associates Properties, Inc., the sum of 60,000.00 in actual damages and the sum of \$50,000 in punitive damages, with interest thereon at the rate provided by law.

Further, pursuant to jury verdict and the Court's previous granting in part of defendant's motion for judgment as a matter of law, judgment is hereby entered in favor of defendant and against plaintiff regarding plaintiff's claim under the Americans with Disabilities Act and plaintiff's claim under the Family and Medical Leave Act.

ORDERED this 1 day of JUNE, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

MT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAYMOND E. WALKER, JR.,
ELIZABETH BRADLEY-WALKER,
husband and wife,

Plaintiffs,

vs.

ADAMS AND ASSOCIATES OF NEVADA,
INC., a/k/a ADAMS AND ASSOCIATES,
INC., d/b/a TULSA JOB CORPS,

Defendants.

Case No. 98-CV-806-B(M)

Judge Brett

ENTERED ON DOCKET

JUN 2 1999


DATE _____

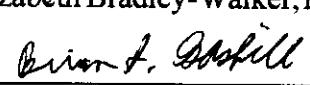
**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss with prejudice this matter in its entirety including Plaintiffs' allegations of violation of their COBRA rights, 29 U.S.C. § 1611 *et seq.*

WHEREFORE, the parties request the Court enter the Order of Dismissal with Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorney fees and costs.


Raymond E. Walker, Plaintiff

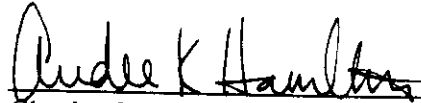

Elizabeth Bradley-Walker, Plaintiff


Brian S. Gaskill
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103-3136

Attorney for Plaintiffs

10

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Charles S. Plumb, OBA No. 7194

Audra K. Hamilton, OBA No. 17872

Doerner, Saunders, Daniel &

Anderson

320 South Boston Avenue

Suite 500

Tulsa, Oklahoma 74103-3725

(918) 582-1211, FAX: (918) 591-5362

ADAMS AND ASSOCIATES OF NEVADA,
INC., a/k/a ADAMS AND ASSOCIATES, INC.,
d/b/a TULSA JOB CORPS

Attorneys for Defendant

107

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAYMOND E. WALKER, JR.,

Plaintiff,

vs.

ADAMS AND ASSOCIATES OF NEVADA,
INC., a/k/a ADAMS AND ASSOCIATES,
INC., d/b/a TULSA JOB CORPS,

Defendant.

Case No. 98-CV-0677K(M)

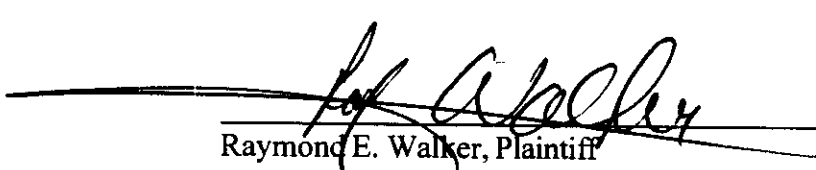
Judge Kern


ENTERED ON DOCKET
DATE JUN 2 1999

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss with prejudice this matter in its entirety including Plaintiff's allegations of race discrimination and/or racial harassment.

WHEREFORE, the parties request the Court enter the Order of Dismissal with Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorney fees and costs.


Raymond E. Walker, Plaintiff


Brian S. Gaskill
2300 Williams Center Tower II
Two West Second Street
Tulsa, Oklahoma 74103-3136

Attorney for Plaintiff



Charles S. Plumb, OBA No. 7194
Audra K. Hamilton, OBA No. 17872
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ADAMS AND ASSOCIATES OF NEVADA,
INC., a/k/a ADAMS AND ASSOCIATES, INC.,
d/b/a TULSA JOB CORPS

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**
NORTHERN DISTRICT OF OKLAHOMA

JUN 01 1999

PHILLIP CHRISTOPHER GREELEY

Petitioner,

vs.

RAY LITTLE, WARDEN; and THE
ATTORNEY GENERAL OF THE STATE
OF OKLAHOMA

Respondents.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-237-BU (M) ✓

ENTERED ON DOCKET

DATE **JUN 2 1999**

REPORT AND RECOMMENDATION

On April 21, 1999, the undersigned United States Magistrate Judge entered an order denying Petitioner's motion to proceed *in forma pauperis*. Petitioner was instructed to remit the filing fee of \$5.00, or show cause in writing for his failure to do so on or before May 24, 1999. Petitioner was advised that failure to do so may result in dismissal of his Petition.

The May 24, 1999, deadline has passed. As of the date of this recommendation, Petitioner has not complied with the requirements of the April 24, 1999, order. The undersigned United States Magistrate Judge therefore recommends that Petitioner's action be DISMISSED, without prejudice, for failure to prosecute.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and

recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 1st day of June, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

2nd Day of June, 1999.
C. Portillo, Deputy Clerk

MT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUN 01 1999

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

THOMAS J. ALMOND and
JACQUELINE ALMOND,

Plaintiffs,

v.

Case No. 98 CV 0555H(M)

JOHN EVERETT ARBUCKLE and
CONTINENTAL EXPRESS, S.D., INC.,
a South Dakota corporation, F/K/A
DALLAS CARRIERS CORP., a Texas
corporation,

Defendants.

ENTERED ON DOCKET
JUN - 2 1999
DATE

STIPULATION FOR DISMISSAL WITH PREJUDICE

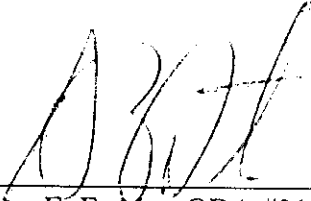
COME NOW the attorneys for the Plaintiff and the Defendant, respectively, and hereby stipulate and agree that the above captioned cause may, upon order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein and state that a compromise settlement covering all claims involved in the above captioned cause has been made between the parties, and the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.

mail
copy not
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RESPECTFULLY SUBMITTED:



Robert B. Mills, OBA #6239
J. Drew Houghton, OBA #18080
THE MILLS LAW FIRM
One Leadership Square, Suite 500
211 N. Robinson
Oklahoma City, Oklahoma 73102
ATTORNEYS FOR THE DEFENDANTS,
JOHN EVERETT ARBUCKLE and
CONTINENTAL EXPRESS, S.D., INC.,
a South Dakota corporation, F/K/A
DALLAS CARRIERS CORP., a Texas
Corporation



James E. Frasier, OBA #3108
J.L. Franks, OBA #13592
FRASIER, FRASIER & HICKMAN
1700 Southwest Boulevard
P.O. Box 799
Tulsa, Oklahoma 74101-0799
- and -
Geoffrey B. Steiner, Esquire
GEOFFREY B. STEINER, P.A.
2529 West Busch Blvd., Suite 800
Tampa, Florida 33618
ATTORNEYS FOR THE PLAINTIFFS,
THOMAS J. ALMOND and
JACQUELINE ALMOND

FILED

JUN -1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA ESLEY, Administratrix
of the ESTATE OF RICHARD
ESLEY

Plaintiff,

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Defendant.

No. 99-C-0120-B(E)

ENTERED ON DOCKET
JUN 02 1999
DATE _____

ORDER

Before the Court is Plaintiff's Motion to Remand (Docket #4) and Defendant's Second Amended Notice of Removal with attached Petition and other pleadings filed in the District Court of Tulsa, County (Docket #1), and the Court finds the pleadings do not establish jurisdiction in this Court.

The Court previously remanded this case based upon the fact that Defendants had attached a Petition which was wholly unrelated to the action which Defendant attempted to remove. This was done on the basis of *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995). Defendant takes issue with the Court's citation to *Laughlin* in response to the Plaintiff's Motion to Remand, apparently assuming the Court reviewed only the incorrectly attached Petition. Defendant states the first Notice of Removal explained "that

Plaintiff seeks UM benefits for the death of her spouse and that the amount of coverage exceeds \$75,000.00." This statement in the Notice of Removal does not however resolve the issue of jurisdiction.

It is Defendant's position that so long as the insurance policies under which Plaintiff seeks to recover have policy limits of \$100,000.00 and Plaintiff sues under two such policies, it is automatic for this Court to find that Plaintiff seeks in excess of the jurisdictional amount in spite of Plaintiff's state prayer which recites the Oklahoma statutory requirement of "in excess of \$10,000." This Court does not agree.¹

The Court recognizes that there are circumstances where the policy limit of a policy will determine amount in controversy. *See Payne v. State Farm Mutual Ins. Co.*, 266 F.2d 63 (5th Cir. 1959)(jurisdiction controlled by limitation of liability in policy and not by amount of alleged damages).

In the instant case however, the fact that two UM policies are available to Plaintiff under which she may recover does not indicate that she will recover the face value of either or both policies.² Both policies are equally available to Plaintiff in this circumstance and Plaintiff could, as Plaintiff urges, potentially jeopardize her eventual recovery if she failed to recognize the potential right of contribution and name only one of the two policies.

¹Defendant also states Plaintiff's Motion to Remand is untimely, however, the Court need not address this issue as *Laughlin* creates an independent duty by the Court to determine jurisdiction.

²*See Warth v. State Farm Fire & Cas. Co.*, 792 F. Supp. 101 (M.D.Fl.1992)(face amount of insurance coverage does not control on issue of jurisdictional amount).

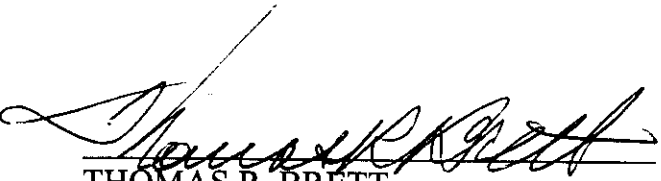
The Court has reviewed the Second Amended Notice of Removal pursuant to the directive of this circuit in *Laughlin* and concludes that neither the Petition nor the Second Amended Notice of Removal establish the requisite jurisdictional amount for purposes of diversity jurisdiction. Defendants allegations are legally insufficient to establish the amount in controversy by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993).

Removal statutes are narrowly construed and uncertainties resolved in favor of remand. The presumption is against removal jurisdiction.

The Court concludes it is without subject matter jurisdiction to proceed in this matter. Accordingly, the case should be remanded to the District Court of Tulsa County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 27th DAY OF JUNE, 1999, AT TULSA, OKLAHOMA.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILE

JUN - 2 1999

KATHRYN S. DUKE,

Plaintiff,

v.

PARADIGM FINANCIAL GROUP, ACCOUNT
MANAGEMENT INFORMATION, INC.,
CREDIT BUREAU OF OKLAHOMA CITY,
INC., CSC CREDIT SERVICES,
EQUIFAX CREDIT INFO and
TRANS UNION,

Defendants.

Phil Lombardi,
U.S. DISTRICT C

Case No. 98CVO 459B (E)

ENTERED ON DOCKET
JUN 02 1999
DATE

RULE 54(b) CERTIFICATION DIRECTING ENTRY OF FINAL JUDGMENT

Having considered CSC Credit Services, Inc.'s ("CSCCS")
and Credit Bureau of Oklahoma City's ("Credit Bureau") application
for Rule 54(b) certification, the Court expressly determined that
there is no just reason for the delay of final judgment.
Accordingly, the Court orders, adjudges, and decrees that summary
judgment in favor of CSCCS and Credit Bureau is a final and binding
judgment with regard to all claims brought against them.

DATED THIS 2nd DAY OF June, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

53

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHIRLEY ANN ARMER,

Plaintiff,

vs.

Case No. 97-CV-430-BU(J)

HEYER-SCHULTE, a wholly owned
subsidiary of BAXTER HEALTHCARE
CORPORATION, et al.,

Defendants.


ENTERED ON DOCKET
JUN - 1 1999

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P.
41(a)(1), it is hereby

ORDERED AND ADJUDGED that Plaintiff, Shirley Ann Armer's
action against Defendants, Bristol-Myers Squibb Company, Inc.,
Nusil Technology f/k/a McGhan Nusil Corporation, Surgitek Inc.,
individually and d/b/a Surgitek/Medical Engineering Corp., and
Medical Engineering Corporation, individually and d/b/a
Surgitek/Medical Engineering Corp., is dismissed with prejudice,
with each party to bear its own costs.

ENTERED this 27th day of May, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ERNEST RAY MIETTUNEN,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

ENTERED ON DOCKET

DATE JUN - 1 1999

Case No. 97-CV-690-K (J)

F I L E D

MAY 28 1999


Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 28 day of May, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ERNEST RAY MIETTUNEN,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

Case No. 97-CV-690-K (J)

ENTERED ON DOCKET

DATE **JUN - 1 1999**

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, represented by attorney C. Rabon Martin, is currently in the custody of the Oklahoma Department of Corrections. Petitioner challenges his conviction entered in Washington County District Court, Case No. F-95-648. Respondent has filed a Rule 5 response (#10) as well as transcripts from Petitioner's trial court proceedings, including his preliminary hearing (#13), his hearing on a motion to suppress (#12), and his trial (#11). After receiving three (3) extensions of time, Petitioner filed a reply to Respondent's response (#20). Petitioner has also submitted a request for decision (#22) and a request for dispositional ruling (#23). For the reasons discussed below, the Court concludes that this petition should be denied. Petitioner's requests for ruling have been rendered moot.

BACKGROUND

The record before the Court demonstrates that on November 7, 1993, Petitioner was stopped by a Bartlesville police officer because the blue and white Ford van he was driving matched the description of a vehicle previously reported to have been involved in a hit-and-run accident.

Petitioner, alone in the van, brought the van to a stop in a private driveway. The police officer asked Petitioner for his driver's license and proof of insurance. After learning Petitioner had no license with him, the officer ran a license check and learned Petitioner's license was suspended. Petitioner was arrested for driving under suspension. The vehicle Petitioner was driving was impounded and the contents inventoried. Among the items found during the inventory was a baggy containing a leafy substance, later confirmed to be marijuana.

On June 8, 1995, after the trial court denied his motion to suppress, Petitioner waived his right to jury trial and stipulated to the evidence presented at preliminary hearing in Washington County District Court, Case No. F-95-648. He was convicted of Unlawful Possession of Marijuana, Second Offense, and received a sentence of 3 years imprisonment. During his state trial court proceedings, Petitioner was represented by attorneys Todd G. Tucker and C. Rabon Martin.

Petitioner, represented by attorney Martin, perfected a direct appeal. On appeal, Petitioner argued that "the trial court erred in overruling Petitioner's motion to suppress, as the inventory search first, was not done pursuant to the Bartlesville police department policy and procedure and second, the vehicle was on private property, thereby not necessitating the need to inventory it and remove it from the property." (#10, Ex. B). On March 26, 1997, the Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction in an unpublished summary opinion (#10, Ex. A). Petitioner sought rehearing, arguing that the court's decision was in conflict with controlling case law pertaining to the seizure of evidence from a car during an inventory search and the requirements for a valid inventory search. Petitioner also supplemented his request for rehearing, criticizing the summary opinion format employed by the state appellate court. The Oklahoma Court of Criminal Appeals denied Petitioner's request for rehearing on June 4, 1997. (#10, Ex. D).

Petitioner, again represented by attorney Martin, filed the instant § 2254 petition for writ of habeas corpus on July 28, 1997. He alleges that:

- (1) Petitioner was subjected to an illegal stop and detension (sic);
- (2) the automobile impoundment inventory conducted after the arrest was an illegal search; and
- (3) the impoundment of Petitioner's automobile was illegal.

ANALYSIS

A. Application of AEDPA

Petitioner filed his habeas corpus petition on July 28, 1997, more than one year after the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, the Court reviews this petition under the amended provisions of 28 U.S.C. § 2254. See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2068 (1997).

The habeas corpus statute, as amended by the AEDPA, provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner's claims numbered 2 and 3 were considered on the merits and rejected by the Oklahoma Court of Criminal Appeals on direct appeal. Therefore, unless the claims are otherwise barred, § 2254(d) will guide this Court's analysis of those claims.

B. Exhaustion and Procedural Bar

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Although Petitioner's second and third claims were raised on direct appeal, Respondent asserts that Petitioner failed to raise his first claim, that his Fourth Amendment rights were violated due to an illegal stop and detention, on direct appeal. According to Respondent, Petitioner first raised the issue of the allegedly invalid stop in his petition for rehearing but that a claim raised in that procedural context, see Castille v. Peoples, 489 U.S. 346, 351 (1989), is insufficient to satisfy the "fair presentation" requirement of the exhaustion doctrine. As a result, Respondent asserts Petitioner's first claim is unexhausted.

After reviewing the record provided in this case, the Court finds Petitioner has not fairly presented his claim that he was stopped and detained illegally in violation of the Fourth Amendment to the Oklahoma Court of Criminal Appeals. See Picard v. Connor, 404 U.S. 270, 278 (1971) (holding that the substance of a federal habeas corpus claim must first be presented to the state courts); Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997); Nichols v. Sullivan, 867 F.2d 1250, 1252 (10th Cir. 1989); Jones v. Hess, 681 F.2d 688, 693 (10th Cir. 1982). The focus of Petitioner's direct appeal was the trial court's failure to suppress evidence obtained as a result of the allegedly illegal impoundment and inventory of the vehicle Petitioner was driving at the time of his arrest. Petitioner did not argue on appeal that the initial stop leading to his arrest was illegal. Furthermore, even if Petitioner raised the issue in his petition for rehearing,¹ the merits of the claim would not

¹The petition for rehearing is not a part of the record provided in this case. However, based on the order denying rehearing entered by the Court of Criminal Appeals (#10, Ex. D), it does not appear that Petitioner raised the issue of the legality of the stop in his petition for rehearing.

have been considered by the Court of Criminal Appeals in the procedural context of a petition for rehearing. As a result, the Court finds the claim was not "fairly presented" to the Oklahoma Court of Criminal Appeals and is unexhausted.

However, Respondent concedes and the Court agrees that to require Petitioner to return to state court to exhaust his illegal stop claim would be futile because the state courts would undoubtedly impose a procedural bar on the claim. Based on Okla. Stat. tit. 22, § 1086, the Oklahoma Court of Criminal Appeals routinely bars claims first raised in an application for post-conviction relief that could have been but were not raised on direct appeal.

As a general rule, the doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined or would decline to reach the merits of a claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's first claim, that he was illegally stopped and detained in violation of the Fourth Amendment, is procedurally barred from review by this Court. The Oklahoma Court of Criminal Appeals' procedural bar, based

on Okla. Stat. tit. 22, § 1086, as would be applied to Petitioner's claim satisfies both the "independent" and "adequate" requirements.

Because of his procedural default, this Court may not consider Petitioner's invalid stop claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Rather than attempting to show either "cause and prejudice" or a "fundamental miscarriage of justice" to overcome the procedural bar, Petitioner in this case contends that state remedies have been exhausted and accuses counsel for Respondent of attempting to "ensnare and entangle the Petitioner and the Court in a morass of procedural gobbledy-gook" (#20 at 1). Federal habeas corpus petitioners are often "ensnared" in procedural dilemmas with often seemingly harsh outcomes. Nonetheless, this Court must apply well-established law requiring recognition and application of a procedural bar to claims defaulted in state court. Petitioner has made no effort to overcome the procedural bar by arguing that he fits either the "cause and prejudice" or the "fundamental miscarriage of justice" exception. See Herrera v. Collins, 113 S.Ct. 853, 862 (1993);

Sawyer v. Whitley, 505 U.S. 333, 339 (1992). Therefore, the Court concludes that Petitioner's first claim should be denied as procedurally barred.

C. Petitioner is not entitled to habeas corpus relief on his second and third claims

Petitioner asserts that he was convicted in violation of the Fourth Amendment based on evidence, a baggy containing marijuana, obtained following an illegal impoundment and inventory of the vehicle he was driving. Petitioner argues that the impoundment of his vehicle was unnecessary, and therefore illegal, since Petitioner had pulled onto private property after being stopped by the Bartlesville police officer. The owner of the property made no request for impoundment. Also, Petitioner argues the resulting inventory of the vehicle's contents, which yielded the bag of marijuana, was illegal.

The thrust of Petitioner's claim is that he was convicted based on evidence obtained in violation of his Fourth and Fourteenth Amendment right to be free of unreasonable searches and seizures. However, Fourth Amendment exclusionary rule claims are not cognizable in federal habeas corpus proceedings if the petitioner had an opportunity for full and fair litigation of the claim in state court. Stone v. Powell, 428 U.S. 465, 494 (1976); see also Miranda v. Cooper, 967 F.2d 392, 401 (10th Cir.1992) (reiterating that court should focus on procedural "opportunity" to raise claims, and holding petitioner's Fourth Amendment claim not cognizable because he failed to present it to state court despite adequate time to do so); Gamble v. Oklahoma, 583 F.2d 1161, 1164-65 (10th Cir.1978) (explaining that court should focus primarily on whether a state provided a procedural opportunity to litigate Fourth Amendment claims in determining whether the state provided "an opportunity for full and fair litigation" of such claims). The record of Petitioner's proceedings in state court indicates

he challenged the constitutionality of the search and seizure both through a motion to suppress in the trial court, and as the only issue raised in his direct appeal. The Oklahoma state courts reviewed and rejected his claim on the merits. Petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court, and, pursuant to the bar imposed by Stone, this Court is precluded from granting federal habeas relief on that ground.

In an effort to avoid the bar of Stone v. Powell, Petitioner argues that he was denied a full and fair opportunity to litigate his Fourth Amendment issues in state court because the Oklahoma Court of Criminal Appeals arbitrarily refused to extend to Petitioner the benefits of "well-entrenched [Fourth Amendment] case law" in derogation of the doctrine of *stare decisis*. Counsel for Petitioner believes that the summary opinion format used by the Oklahoma Court of Criminal Appeals in affirming Petitioner's conviction failed to constitute a "full and fair opportunity" to litigate his Fourth Amendment claim. The Court disagrees. Petitioner fully briefed the issue as it was raised on direct appeal. In its summary opinion, the state appellate court stated that "[a]fter a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence." (#10, Ex. A). Furthermore, the state trial court held a hearing on Petitioner's motion to suppress and at that hearing, Petitioner had the opportunity to fully argue the Fourth Amendment issue. See #12. In reality, Petitioner is aggrieved because two state courts found against him on his Fourth Amendment claim. His effort to couch this situation as one challenging the fairness and integrity of the state judicial process is unavailing. Petitioner's Fourth Amendment claim is barred by Stone from consideration as a basis for federal habeas relief because he had a full and fair opportunity to litigate his claim in the state courts.

As a more general matter, a federal court cannot grant a habeas application by a state prisoner if the claim was decided on the merits in state court, unless the decision was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court or was based on an unreasonable determination of the facts in light of the evidence presented in state court. See §28 U.S.C. § 2254(d). The state trial court's conclusion that the impoundment and inventory were valid does not meet that standard and thus cannot serve as a basis for relief under § 2254. See § 2254(d). Habeas corpus relief on grounds two and three should be denied.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and that the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**. Petitioner's "request for decision" (#22) and "request for dispositional ruling" (#23) are **moot**.

SO ORDERED THIS 28 day of May, 1999.



TERRY C. KEEN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD D. BLACKBURN,

Plaintiff,

vs.

WILLIAM HENDERSON, Postmaster,

Defendant.

ENTERED ON DOCKET
JUN - 1 1999
DATE _____

No. 98-CV-776-K ✓

F I L E D

MAY 28 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Motion to Dismiss (#8) of Defendant, United States of America pursuant to *Fed. R. Civ. P. 4(i)* on the grounds that Plaintiff has failed to deliver or mail by certified or registered mail a copy of the summons and complaint to the United States Attorney for the district in which the action is brought. In addition, that rule requires that the summons and complaint be mailed by certified or registered mail to the Attorney General in Washington D.C. Plaintiff has failed to meet these requirements.

This action was filed by the Plaintiff on October 7, 1998. The case law clearly establishes that the requirement of 4(i) must be complied with and that the government has a right to insist on proper service. Prisco v. Frank, 929 F.2d 603, 604 (11th Cir.1991) (holding, that when the plaintiff has failed to properly serve the United States Attorney, the complaint must be dismissed). Pursuant to *Fed.R.Civ.P. 4(m)*, the Plaintiff had one hundred and twenty days (120) to serve the United States with a copy of the summons and the complaint. Only in the event that a plaintiff shows good cause for the failure to serve the proper defendant shall the district court extend the time for service.

9

Fed.R.Civ.P. 4(m). Most often "good cause" is present when a plaintiff appears *pro se* and is unfamiliar with the Federal Rules of Civil Procedure. Espinoza v. United States, 52 F.3d 838 (10th Cir. 1995) (holding that *pro se* plaintiff was allowed an extension of the 120 day specification of Rule 4(m)). Here, Plaintiff has been represented through the administrative process and throughout all proceedings by counsel. Furthermore, this case was filed over seven (7) months ago, far exceeding the 120 day period allowed by the Federal Rules.

The Court finds that the Plaintiff has completely failed to comply with the service provisions of the Federal Rules of Civil Procedure. At no point in the course of this litigation has the Plaintiff requested an extension of time to serve the Defendant, the Plaintiff has been represented by counsel at all times, and the Plaintiff has moved beyond the 120 day period by a considerable length.

Because the Plaintiff has not shown good cause for failure to serve, the Court finds that the Motion to Dismiss must be granted WITHOUT PREJUDICE pursuant to *Fed. R. Civ. P. 4(i)*.

ORDERED THIS 28 DAY OF MAY, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHEILA K. LARSON,

Defendant.

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No. 99CV0087K(M)

ENTERED ON DOCKET

DATE JUN - 1 1999

FILED

MAY 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 28 day of May, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Sheila K. Larson, appearing not.


The Court being fully advised and having examined the court file finds that Defendant, Sheila K. Larson, was served with Summons and Complaint on April 17, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Sheila K. Larson, for the principal amount of \$3,301.15, plus accrued interest of \$640.36, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.737 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

LFR/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OKLAHOMA

LINDA JEAN BARR,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,
individually and d/b/a SURGITEK/MEDICAL
ENGINEERING CORP. and BRISTOL MYERS
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN - 1 1999

Civil Action No. 97 CV 886 J (W)

FILED

MAY 28 1999

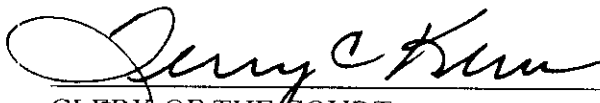
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Linda Jean Barr and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: May 28, 1999


CLERK OF THE COURT

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
MEDICAL ENGINEERING CORPORATION,
INDIVIDUALLY AND D/B/A SURGITEK/
MEDICAL ENGINEERING CORP. AND
BRISTOL MYERS SQUIBB COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBBY DERNOVISH,

Plaintiff,

vs.

SURGITEK, INC., individually and d/b/a
SURGITEK/MEDICAL ENGINEERING
CORP., MEDICAL ENGINEERING
CORPORATION, individually and d/b/a
SURGITEK/MEDICAL ENGINEERING
CORP. and BRISTOL MYERS SQUIBB
COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN - 1 1999

Civil Action No.: 97CV 520 K(W)

FILED

MAY 28 1999

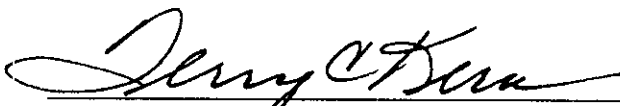
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Debby Dernovish and defendants Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: May 28, 1999


CLERK OF THE COURT

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
SURGITEK, INC., individually and d/b/a
SURGITEK/MEDICAL ENGINEERING
CORP., MEDICAL ENGINEERING
CORPORATION, individually and d/b/a
SURGITEK/MEDICAL ENGINEERING
CORP. and BRISTOL MYERS SQUIBB
COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

VONDA DOBBS,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,
individually and d/b/a SURGITEK/MEDICAL
ENGINEERING CORP. and BRISTOL MYERS
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN - 1 1999

Civil Action No.: 97 CV 1105K(M)

FILED

MAY 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Vonda Dobbs and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: May 28, 1999


~~CLERK OF~~ THE COURT

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
MEDICAL ENGINEERING CORPORATION,
INDIVIDUALLY AND D/B/A SURGITEK/
MEDICAL ENGINEERING CORP. AND
BRISTOL MYERS SQUIBB COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAY KLINGE, Next of Kin and Surviving
Spouse of Annette Klinge, Deceased,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,
individually and d/b/a SURGITEK/MEDICAL
ENGINEERING CORP. and BRISTOL MYERS
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE JUN - 1 1999

97-CV-882-K

Civil Action No.: 97-P-11710-S

F I L E D

MAY 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiff Ray Klinge, Next of Kin and Surviving Spouse of Annette Klinge (Deceased) and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: May 28, 1999


~~CLERK OF THE COURT~~

Copies to Counsel as follows:

Mark B. Hutton
HUTTON & HUTTON
8100 East 22nd Street North
Building 1200
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan
J. Margaret Tretbar
SHOOK, HARDY & BACON L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS
MEDICAL ENGINEERING CORPORATION,
INDIVIDUALLY AND D/B/A SURGITEK/
MEDICAL ENGINEERING CORP. AND
BRISTOL MYERS SQUIBB COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 28 1999

Nobel Insurance Company,
a Texas Corporation.

Plaintiff,

vs.

Petro Energy Transport, Co.
an Oklahoma Corporation

Defendant.

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Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1079K(J)

ENTERED ON DOCKET

DATE JUN - 1 1999

ORDER DISMISSING ACTION

Came on for consideration the Agreed Motion for Dismissal without Prejudice filed in this cause. After considering the Agreed Motion, the Court does hereby order as follows:

IT IS ORDERED that Plaintiff Nobel Insurance Company's claims against Defendant Petro Energy Transport Company are hereby dismissed without prejudice as to the refiling of same and that this Defendant is dismissed from this action, with each party to bear its own costs.

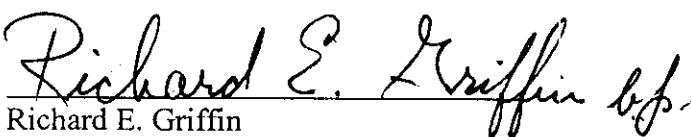
SIGNED this 28 day of May, 1999.


PRESIDING JUDGE

Approved:



Michael P. Atkinson
Counsel for Plaintiff Nobel Insurance Company



Richard E. Griffin
Counsel for Defendant Petro Energy Transport Company